15-109

No.

In the Supreme Court of the United States

JERMAINE SIMMONS AND BRIAN BUTTS, PETITIONERS

v.

WALTER J. HIMMELREICH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Tort Claims Act (FTCA) judgment bar, 28 U.S.C. 2676, provides that "[t]he judgment in an action under section 1346(b) of this title," *i.e.*, the statutory provision that grants subject matter jurisdiction to federal district courts over FTCA cases, "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." The question presented here is the same question on which this Court granted certiorari (but did not resolve) in *Will* v. *Hallock*, 546 U.S. 345 (2006):

Whether a final judgment in an action brought under Section 1346(b) dismissing the claim on the ground that relief is precluded by one of the FTCA's exceptions to liability, 28 U.S.C. 2680, bars a subsequent action by the claimant against the federal employees whose acts gave rise to the FTCA claim.

PARTIES TO THE PROCEEDING

Petitioners are Jermaine Simmons and Brian Butts.[1]

Respondent is Walter J. Himmelreich.

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[1] The motion for summary judgment that gave rise to the district court and court of appeals' decisions at issue in this petition erroneously identified Amanda Newland and Janet Bunts as movants. See D. Ct. Doc. 45, at 1 (Apr. 26, 2013). In fact, the district court had already dismissed the Eighth Amendment *Bivens* claims against those defendants, and the court of appeals had affirmed those dismissals. See App., *infra*, 40-44a (dismissing Eighth Amendment claim against Bunts and Newlands); *id.* at 30a-32a & n.1 (affirming dismissal of those claims). Defendant Janel Fitzgerald remains a party to this case in the district court, but she is not a party to the Eighth Amendment claim that is the subject of this petition. *Id.* at 27a-29a (analyzing allegations against Fitzgerald as part of respondent's First Amendment claim).

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the federal-officer petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 766 F.3d 576. The order of the court of appeals denying rehearing en banc (App., *infra*, 11a-12a) is unreported. The opinion of the district court (App., *infra*, 13a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2014 (App., *infra*, 1a-10a). A petition for rehearing en banc was denied on March 10, 2015 (App., *infra*, 11a-12a). On May 22, 2015, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including July 23, 2015.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, are set out in an appendix to this petition. App., *infra*, 64a-72a.

STATEMENT

The question in this case is whether the FTCA judgment bar, 28 U.S.C. 2676, applies to an FTCA judgment based on one of the exceptions to FTCA liability set forth in 28 U.S.C. 2680. That is the same question on which this Court granted certiorari in *Will* v. *Hallock*, 546 U.S. 345 (2006). The Court did not resolve that question in *Will* because it concluded that the Second Circuit had lacked jurisdiction to hear the appeal. *Id.* at 349.

Here, the district court applied the FTCA judgment bar and granted petitioners' motion to dismiss respondent's Eighth Amendment claim brought pursuant to *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). App., *infra*, 20a-22a. The court of appeals reversed. *Id.* at 1a-10a. Just like the Second Circuit in *Will*, the Sixth Circuit here concluded that the term "judgment" in the FTCA judgment bar does not encompass FTCA judgments based on Section 2680. *Id.* at 7a-8a; *Hallock* v. *Bonner*, 387 F.3d 147, 155 (2d Cir. 2004), vacated on other grounds *sub nom. Will* v. *Hallock*, *supra*.

1. The FTCA judgment bar provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676.

Thus, by its plain terms, the judgment bar protects a federal employee from suit where the claimant has brought an action against the United States under the FTCA, that action has gone to judgment, and the suit against the employee concerns the same subject matter. *Ibid.*

Section 1346(b) is the jurisdictional provision of the FTCA. It grants the district courts "exclusive jurisdiction" over tort claims against the United States. Specifically, Section 1346(b) provides that

> Subject to the provisions of chapter 171 of this title, [the district courts] shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 1346(b)(1).

Chapter 171 of Title 28 contains various procedural and liability provisions of the FTCA. See 28 U.S.C. 2671-2680. Section 2680 of Chapter 171 enumerates several exceptions to the FTCA, including for any claim based upon a federal employee's "exercise or performance or the failure to exercise or perform a discretionary function or duty." 28 U.S.C. 2680(a). Section 2680 itself states that Section 1346(b) "shall not apply" to the categories of claims set forth in its list of exceptions, and this Court and the courts of appeals have generally recognized that Section 2680's

exceptions to FTCA liability constitute "jurisdictional" limits on the power of courts to adjudicate FTCA claims.[2]

2. Respondent is currently a federal inmate at the Federal Correctional Institution (FCI) in Danbury, Connecticut. He is serving a 240-month sentence for production of child pornography, in violation of 18 U.S.C. 2251(b). Pet. C.A. Br. 2. Respondent asserts that in October 2008, while serving his sentence at the FCI in Elkton, Ohio, he was assaulted by another inmate at the prison. *Id.* at 2-3. According to respondent, petitioners—both of whom are staff members at FCI Elkton—were on notice that the other inmate intended to attack him, and yet placed him in the general prison population where he would be exposed to the attack. *Ibid.*; App., *infra*, 2a, 14a.

a. In February 2010, respondent filed an FTCA action in federal district court against the United States. Pet. C.A. Br. 3. In October 2010, he filed this case as a separate action against petitioners (along with various other defendants who are not a party to this petition) under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Among other claims, respondent alleged that petitioners' actions in connection with the assault on respond-

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[2] See, *e.g.*, *Dalehite* v. *United States*, 346 U.S. 15, 24, 31 n.25 (1953); *Domme* v. *United States*, 61 F.3d 787, 789 (10th Cir. 1995); *Richardson* v. *United States*, 943 F.2d 1107, 1113 (9th Cir. 1991), cert. denied, 503 U.S. 936 (1992); *Sowell* v. *United States*, 835 F.2d 1133, 1135 (5th Cir. 1988); *Formula One Motors, Ltd.* v. *United States*, 777 F.2d 822, 823 (2d Cir. 1985); but see *Williams* v. *Fleming*, 597 F.3d 820, 823-824 (7th Cir. 2010); see generally 1 Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* § 7.01[2] (2014).

ent by another inmate violated the Eighth Amendment. Pet. C.A. Br. 5-6.

In November 2010, the district court dismissed respondent's FTCA action pursuant to the FTCA's discretionary-function exception, 28 U.S.C. 2680(a). App., *infra*, 47a-54a. The court explained that decisions by prison officials regarding inmate safety generally involve the exercise of judgment. *Id.* at 49a-50a. It noted that respondent had not alleged that petitioners were aware of any specific threats directed at him, and it emphasized that petitioners made a "policy decision" to house respondent in the general population based on the absence of any specific threat against him. *Id.* at 52a-53a. The court also explained that Section 2680(a) is an exception to the FTCA's general waiver of sovereign immunity from tort claims against the United States, and that the court therefore "lacks subject matter jurisdiction over acts falling within the discretionary function exception." *Id.* at 49a. On November 18, 2010, the district court formally issued a document entitled "Judgment Entry" that declared that it was "ORDERED, ADJUDGED, and DECREED" that the case was dismissed. *Id.* at 55a-56a.[3]

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[3] Several days later, respondent filed a motion asking the district court to alter or amend the judgment and to reconsider the dismissal of his FTCA claim. See 10-cv-00307 Docket entry (Dkt.) No. 37 (Nov. 30, 2010). The court denied the motion, and respondent's subsequent appeal was eventually dismissed by the court of appeals for failure to prosecute. Dkt. No. 38 (Dec. 2, 2010); App., *infra*, 57a-58a. In July 2012, respondent filed a motion asking the district court to recall the judgment. Dkt. No. 45 (July 26, 2012). The district court denied that motion, and the court of appeals affirmed. App., *infra*, 59a-60a.

b. In March 2011, the district court in respondent's separate *Bivens* action dismissed that action under 28 U.S.C. 1915(e) for failure to state a claim. App., *infra*, 34a-46a. In May 2012, the court of appeals remanded the *Bivens* Eighth Amendment claim alleging that the individual defendants had failed to protect respondent from the inmate-on-inmate assault. *Id.* at 30a-31a.[4]

On remand, the district court granted the government's motion for summary judgment on the Eighth Amendment claim on two alternative grounds: (1) respondent's failure to exhaust his administrative remedies, and (2) Section 2676's judgment bar. App., *infra*, 18a-22a. As to the latter, the court explained that the judgment bar "applies to all judgments" in FTCA actions, including those obtained "because the actions in controversy f[all] under the discretionary exception to the FTCA [28 U.S.C. 2680(a)]." App., *infra*, 21a (citing *Harris* v. *United States*, 422 F.3d 322, 336 (6th Cir. 2005)). The court noted that respondent's Eighth Amendment claim "arises out of the very same occurrence [as the prior FTCA suit]; the assault in 2008, and the same actions; the alleged prison's failure to protect." App., *infra*, 21a.

c. The court of appeals reversed in relevant part. App., *infra*, 1a-10a. The court first excused respondent's failure to exhaust administrative remedies based

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[4] The court of appeals also remanded a *Bivens* claim that respondent brought under the First Amendment. App., *infra*, 27a-29a. Respondent's First Amendment claim remains pending in the district court, and it is not at issue in this petition for certiorari. See *id.* at 17a-18a (subsequent district court opinion dismissing First Amendment claim for failure to exhaust administrative remedies); see also *id.* at 2a-5a (reversing dismissal of First Amendment claim and remanding to district court).

on his allegation—which the court assumed to be true—that prison officials had threatened him with retaliation if he pursued the prison grievance process. *Id.* at 3a-5a. That aspect of the court's ruling is not at issue here.

The court of appeals then held that the FTCA judgment bar did not bar respondent's Eighth Amendment claim. App., *infra*, 6a-10a. The court explained that the district court's dismissal of respondent's FTCA claim under Section 2680(a) was a dismissal for lack of subject-matter jurisdiction. *Id.* at 6a. The court held that "[a] dismissal for lack of subject-matter jurisdiction does not trigger the [Section] 2676 judgment bar," reasoning that, "in the absence of jurisdiction, the court lacks the power to enter judgment." *Ibid.* (citing 10A Charles Alan Wright et al., *Federal Practice and Procedure* § [2]713 (3d ed. 1998) (*Federal Practice & Procedure*)). The court also invoked the "general rule" that "a dismissal for a lack of subject-matter jurisdiction carries no preclusive effect." *Id.* at 9a.

The court of appeals went on to distinguish its prior decision in *Harris*, rejecting the notion that *Harris* had held "that any disposition of an FTCA action prevents other suits." App., *infra*, 7a. The court noted that *Harris* had cited the Second Circuit's decision in *Hallock*, 387 F.3d at 155, which had held that "an action brought under the FTCA and dismissed for lack of subject matter jurisdiction because it falls within an exception to the restricted waiver of sovereign immunity provided by the FTCA [in 28 U.S.C. 2680]" does not qualify as a "judgment" for purposes of the judgment bar. App., *infra*, 7a-8a.

The court of appeals also distinguished its treatment of FTCA dismissals under Section 2680(a) from the approach taken by the Seventh Circuit. App., *infra*, 8a-9a (discussing *Manning* v. *United States*, 546 F.3d 430 (7th Cir. 2008), cert. denied, 558 U.S. 1011 (2009)). The court acknowledged that the Seventh Circuit holds that a dismissal under Section 2680(a) triggers the FTCA judgment bar. *Ibid.* The court explained, however, that the Seventh Circuit treats a Section 2680(a) dismissal as "a decision on the merits," not as a dismissal for lack of jurisdiction. *Ibid.* The court noted that the Seventh Circuit had not yet addressed whether "any dismissal, whether or not on the merits, suffices for application of [the judgment bar]." *Id.* at 9a (quoting *Williams* v. *Fleming*, 597 F.3d 820, 822 n.2 (7th Cir. 2010)).

d. The court of appeals subsequently denied petitioners' petition for rehearing en banc. App., *infra*, 11a-12a.

REASONS FOR GRANTING THE PETITION

This case is worthy of further review for the same reasons that this Court granted certiorari in *Will* v. *Hallock*, 546 U.S. 345 (2006). The FTCA judgment bar, 28 U.S.C. 2676, establishes a "complete bar" to "any action" against government employees in connection with acts that have been the subject of "an action under section 1346(b)" of the FTCA that has gone to "judgment." *Ibid.* The court of appeals' decision rendered the judgment bar inapplicable even though it is undisputed that respondent brought a prior suit pursuant to Section 1346(b) concerning the same subject matter and that, as a result of Section 2680, the district court dismissed respondent's suit and entered a final judgment. Just like the Second Circuit's ruling

in *Hallock*, the court's decision in this case is contrary to the plain language of Section 2676 and exacerbates a direct conflict among the courts of appeals on an important and recurring issue. Review by this Court is warranted.

I. THE COURT OF APPEALS MISCONSTRUED THE JUDGMENT BAR

The FTCA judgment bar unambiguously prohibits respondent from bringing his Eighth Amendment *Bivens* claim against petitioners. In concluding otherwise, the court of appeals repeated the error that the Second Circuit committed in *Hallock*. Certiorari is warranted to correct that error and to enforce the plain meaning of the statutory text enacted by Congress.

A. The FTCA Judgment Bar Is Triggered By Any Judgment Dismissing An FTCA Action Under Section 2680

The text of the FTCA judgment bar is simple and direct, and there is no question that the express elements for its application are satisfied in this case. The statute provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676. Respondent's prior FTCA suit was indisputably "an action under section 1346(b)." *Ibid.* The sole basis asserted for the court's jurisdiction in respondent's suit against the United States was the FTCA. See Dkt. No. 33, at 2 (Nov. 10, 2010) (respondent's statement that "this suit was filed under the [FTCA], 28 U.S.C. §§ 2671, et seq."). It is also clear that the present action arises out of "the

same subject matter" as the FTCA suit, and that "judgment" was entered in the earlier litigation. See App., *infra*, 55a-56a ("Judgment Entry"); *id.* at 21a-22a.

Under the plain text of the judgment bar, it makes no difference that respondent lost his FTCA suit. As the Sixth Circuit itself has recognized, see *Harris* v. *United States*, 422 F.3d 322, 334-335 (2005), and as the other courts of appeals that have considered the question have also concluded, a judgment under the FTCA triggers the judgment bar in a subsequent suit against federal employees on the same subject matter even when the FTCA judgment is adverse to the claimant. See, *e.g.*, *Estate of Trentadue ex rel. Aguilar* v. *United States*, 397 F.3d 840, 858 (10th Cir. 2005); *Hoosier Bancorp of Ind., Inc.* v. *Rasmussen*, 90 F.3d 180, 184 (7th Cir. 1996); *Gasho* v. *United States*, 39 F.3d 1420, 1437 (9th Cir. 1994), cert. denied, 515 U.S. 1144 (1995). Section 2676 is a "judgment bar," not a "favorable judgment bar." As the Tenth Circuit has explained, "Section 2676 makes no distinction between favorable and unfavorable judgments—it simply refers to '[t]he judgment in an action under section 1346(b).'" *Farmer* v. *Perrill*, 275 F.3d 958, 963 (10th Cir. 2001).

Nor does the plain text of the judgment bar render the bar inapplicable where judgment is entered because the claim falls within one of the FTCA's exceptions in Section 2680. The exceptions in Section 2680 limit *both* the jurisdiction of courts over FTCA actions, 28 U.S.C. 1346(b)(1), *and* the substantive liability of the United States, 28 U.S.C. 2674. It does not matter whether the Section 2680 exception was found to apply on a motion to dismiss for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1), on a

motion to dismiss for failure to state a claim upon which relief could be granted under Rule 12(b)(6), on summary judgment under Rule 56, or after a trial. No matter what procedural device triggered the Section 2680 judgment, the judgment bar applies. The district court was therefore right to grant summary judgment to petitioners on respondent's Eighth Amendment claim pursuant to the judgment bar. App., *infra*, 21a-22a.

B. The Court Of Appeals Erred By Reading An Implicit Limitation Into The Unambiguous Text Of Section 2676

Despite the plain language of Section 2676, the court of appeals carved out an exception to the judgment bar where the prior FTCA action is "dismiss[ed] for lack of subject-matter jurisdiction." App., *infra*, 6a. The court explained that because the district court in the FTCA action lacked subject matter jurisdiction, it "lack[ed] the power to enter judgment" and thus that its dismissal of that action does not trigger the judgment bar. *Ibid.* (quoting *Federal Practice & Procedure* § 2713). The court's reasoning and conclusion are both flawed.

1. If taken literally, the court of appeals' statement that the district court that dismissed respondent's FTCA claim on Section 2680 grounds "lacked the power to enter judgment" is not correct. It is, of course, well settled that "[a] federal court always has jurisdiction to determine its own jurisdiction." *United States* v. *Ruiz*, 536 U.S. 622, 628 (2002). When a federal court determines that its own jurisdiction is lacking, the proper recourse is to enter a judgment of

dismissal on that ground.[5] The dismissal of respondent's FTCA claim, though jurisdictional, was plainly a properly entered "judgment."[6]

More likely, the court of appeals concluded that the judgment bar applies only to a *subset* of judgments—those issued "on the merits." That too is incorrect. The text of the judgment bar does not limit its scope to judgments entered "on the merits." As this Court has explained, statutory construction "begins with the language of the statute," and "where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (citation and internal quotation marks omitted). The court of appeals lacked authority to limit the scope of the judgment bar to cover only a subset of judgments.[7]

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[5] See, *e.g.*, *Great W. Ins. Co.* v. *United States*, 112 U.S. 193, 196 (1884) (explaining that when a court "is forbidden to entertain jurisdiction," then a "judgment of dismissal" is appropriate); cf. *United States* v. *United Mine Workers of Am.*, 330 U.S. 258, 291 (1947) (referring to this Court's "judgment declining jurisdiction" over appeal) (citation omitted); Fed. R. Civ. P. 54(a) (defining "judgment" for purposes of federal rules to include "any order from which an appeal lies").

[6] The only authority that the court of appeals cited for its statement that a court "lacks the power to enter judgment" when it has no subject-matter jurisdiction was *Federal Practice and Procedure* § 2713. But that treatise merely indicates that when a court lacks subject-matter jurisdiction, "it has no power to issue a judgment *on the merits*." *Federal Practice & Procedure* § 2713, at 239 (emphasis added). It does not say that the court lacks power to issue any judgment at all.

[7] As discussed further below, the Ninth Circuit has held that the judgment bar does not apply to FTCA judgments dismissing a case due to a curable procedural defect (such as a failure to exhaust administrative remedies), so long as the case involves a

Moreover, even if the court of appeals was right to hold that the judgment bar applies only to FTCA judgments "on the merits," it was wrong to conclude that the dismissal of an FTCA case based on the Section 2680 exceptions is not "on the merits." Those exceptions limit the United States' waiver of its sovereign immunity and, in that sense, they constrain the courts' exercise of jurisdiction. But the text and structure of the FTCA make clear that they are not merely jurisdictional.

The Section 2680 exceptions function both as jurisdictional limitations on the United States' waiver of its sovereign immunity and as substantive restrictions on the United States' liability under Section 2674. See 28 U.S.C. 2680 (stating that neither "[t]he provisions of [Chapter 171]" *nor* of "Section 1346(b)" shall apply to the identified categories of claims). Section 1346(b)(1) waives the sovereign immunity of the United States for tort claims and grants the district courts jurisdiction over such claims, but it does so "[s]ubject to the provisions of chapter 171," *i.e.*, 28 U.S.C. 2671 *et seq.* The provisions of "chapter 171"—including Section 2674 ("Liability of United States") and Section 2680 ("Exceptions")—in turn create and define the scope of the United States' substantive tort liability. Those

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"claim[] for harms that Congress has agreed, in principle, [is] cognizable." *Pesnell* v. *Arsenault*, 543 F.3d 1038, 1046 (2008) (Clifton, J., concurring); *id.* at 1042 (endorsing Judge Clifton's analysis); see p. 22, *infra*. Even on that view, however, the judgment bar applies to any FTCA judgment of dismissal based on the exceptions to liability in Section 2680. *Pesnell*, 543 F.3d at 1046 (applying judgment bar to dismissal under Section 2680(h)). The Ninth Circuit's interpretation of the judgment bar provides an alternative basis for answering the question presented and concluding that the bar applies to any FTCA judgment of dismissal under Section 2680.

provisions are referred to elsewhere in the FTCA as "the limitations and exceptions applicable" to "any action * * * pursuant to section 1346(b)." 28 U.S.C. 2679(d)(4). Because they are incorporated by reference into Section 1346(b)(1), they are also conditions on the waiver of sovereign immunity and limitations on the jurisdiction of the district court. But that does not deprive them of their separate substantive character as well.

This Court's own description of the Section 2680 exceptions correctly recognizes that they set forth limitations on the United States' substantive FTCA liability. In *Levin* v. *United States*, 133 S. Ct. 1224, 1228 (2013), for example, the Court stated that, "[s]ubstantively, the FTCA makes the United States liable" to the same extent as private individuals under state law, "subject to enumerated exceptions to the immunity waiver, §§ 2680(a)-(n)." The Court likewise described the Section 2680 exceptions as limitations on "[t]he liability of the United States" in *United States* v. *Gaubert*, 499 U.S. 315 (1991), further noting that Section 2680(a) provides that "the Government is not liable for" a claim based on the performance of a discretionary function. *Id.* at 322; see *Molzof* v. *United States*, 502 U.S. 301, 310-311 (1992) (referring to the "various statutory exceptions to FTCA liability contained in § 2680"); *United States* v. *Varig Airlines*, 467 U.S. 797, 808 (1984) (noting that Section 2680 exceptions were designed to mark "the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect cer-

tain governmental activities from exposure to suit by private individuals").[8]

Moreover, the Court has recognized the inherently substantive nature of limitations of this sort, even when they are phrased in jurisdictional terms. As the Court explained in *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), "[w]hen a 'jurisdictional' limitation adheres to the cause of action" by "prescrib[ing] a limitation that any court entertaining the cause of action [is] bound to apply," "the limitation is essentially substantive." *Id.* at 695 n.15 (citing *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 951 (1997)). That description is particularly appropriate with respect to the limitations on the United States' liability expressed in Section 2680. Although they are jurisdictional by virtue of their incorporation into 28 U.S.C. 1346(b), they also "prescribe[] a limitation that any court entertaining the cause of action [is] bound to apply." *Altmann*, 541 U.S. at 695 n.15.

Finally, the substantive character of the FTCA's exceptions in Section 2680 is confirmed by the exten-

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[8] The principal draftsman of Section 2680 likewise described the exceptions provided there as "exceptions to liability." See Alexander Holtzoff, *Report on Proposed Federal Tort Claims Bill* 15-16 (1931) ("In order to protect the taxpayers in this connection, * * * it is proposed to safeguard the United States by enumerating certain exceptions to liability. * * * The following is a list of the proposed exceptions to liability: [continues to list and describe exceptions, including what ultimately became Section 2680(c)]."). Although "the [Holtzoff] report was never introduced into the public record," and therefore should not be given "great weight," the Court has recognized that, "in the absence of any direct evidence regarding how members of Congress understood" the Section 2680 exceptions, it is "senseless to ignore entirely the views of its draftsman." *Kosak* v. *United States*, 465 U.S. 848, 857 n.13 (1984).

sive litigation that may be required in order to determine their application—litigation that is, in many cases, not meaningfully different from that required in other, unquestionably merits-related, contexts. In many cases, litigation of the government's assertion of a Section 2680 exception consumes considerable time and energy on the part of the government and judiciary. Frequently, the applicability of one of the exceptions is not resolved until "after extensive discovery and a trial." *Begay* v. *United States*, 768 F.2d 1059, 1060 (9th Cir. 1985); see, *e.g.*, *Aragon* v. *United States*, 146 F.3d 819, 821 (10th Cir. 1998) ("After a four-day bench trial focusing on the discretionary function exception, the district court dismissed the case for lack of subject matter jurisdiction."). The Tenth Circuit has, in fact, adopted a general rule that, because "[t]he determination of whether the FTCA excepts the government's actions from its waiver of sovereign immunity involves both jurisdictional and merits issues," the question should be decided on summary judgment under Federal Rule of Civil Procedure 56. *Bell* v. *United States*, 127 F.3d 1226, 1228 (10th Cir. 1997) (citation omitted). In other cases, the government's invocation of an exception in Section 2680 is ultimately vindicated only on appeal, after the case has already been litigated to judgment following a trial.[9]

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[9] See, *e.g.*, *Varig Airlines*, 467 U.S. at 803-804, 821; *Kelly* v. *United States*, 241 F.3d 755, 757 (9th Cir. 2001) (on appeal from judgment after trial, holding that action was barred by discretionary function exception and remanding "to dismiss * * * for lack of subject matter jurisdiction"); *Andrews* v. *United States*, 121 F.3d 1430, 1435 (11th Cir. 1997) (same).

It is thus not uncommon for the United States to invest considerable resources (with attendant distractions to the government employee whose conduct is at issue) in defending an FTCA suit on the basis of a Section 2680 exception. It would be contrary to both the text and the policies underlying the FTCA's judgment bar to permit the plaintiff then to "turn around and sue" the individual employee, thereby imposing "a very substantial burden" to defend against the suit a second time. *United States* v. *Gilman*, 347 U.S. 507, 511 n.2 (1954) (quoting testimony of Assistant Attorney General Shea). In every relevant sense, the dismissal of an FTCA case under the Section 2680 exceptions qualifies as a dismissal "on the merits."

2. The court of appeals also invoked the "general rule" that "a dismissal for a lack of subject-matter jurisdiction carries no preclusive effect." App., *infra*, 9a. That "general rule" reflects common-law principles of res judicata, but it has no direct application here. The statutory provision drafted by Congress makes application of the judgment bar turn on whether an FTCA case involving the same subject matter has previously been litigated to a judgment—not on whether or when a particular FTCA judgment would have preclusive effect under the common law.[10]

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[10] In *Will*, this Court recognized an analogy between the judgment bar and res judicata when considering the question (not at issue here) of whether to apply the collateral order doctrine to a district court's decision not to apply the judgment bar. 546 U.S. at 354. In doing so, however, the Court noted that "the statutory judgment bar is arguably broader than traditional res judicata." *Ibid.*

Even if the court of appeals was correct that the judgment bar should be interpreted through the prism of res judicata doctrine, however, a Section 2680 dismissal would *still* qualify as a judgment triggering the bar. That is because dismissals on grounds of sovereign immunity are properly regarded as judgments "on the merits" for purposes of res judicata when—as here—the immunity reflects a substantive limitation on the government's liability.

It has often been noted that the "on the merits"/"lack of jurisdiction" dichotomy in traditional res judicata doctrine is unhelpful because of the lack of clarity in the two terms. The "word 'jurisdiction' * * * can play different roles in different legal contexts," *Rose* v. *Town of Harwich*, 778 F.2d 77, 79 (1st Cir. 1985) (Breyer, J.), cert. denied, 476 U.S. 1159 (1986); accord *Kontrick* v. *Ryan*, 540 U.S. 443, 454-455 (2004), and the Second Restatement has abandoned the phrase "on the merits" in the text of the general rule "because of its possibly misleading connotations." Restatement (Second) of Judgments § 19 cmt. a (1982). "The Restatement means the word ['jurisdiction'] to refer to typical 'jurisdictional' dismissals—where, for example, a plaintiff sues in the wrong court. * * * They rest upon * * * defects of a technical or procedural nature which, if cured, normally ought not to bar a plaintiff from bringing the action again." *Rose*, 778 F.2d at 79-80; see *Dozier* v. *Ford Motor Co.*, 702 F.2d 1189, 1192 (D.C. Cir. 1983) (Scalia, J.) (referring to the jurisdiction exception to res judicata as the "'curable defect' exception," which applies where a precondition that was absent in the first suit can be and is remedied before the second).

On the other hand, as this Court has recognized, the phrase "on the merits" encompasses a ruling that, even though perhaps "declining to reach [the] ultimate substantive issues," is "based not on the ground that the distribution of judicial power among the various courts of the State requires the suit to be brought in another court in the State, but on the inaccessibility of all the courts of the State to such litigation." *Angel* v. *Bullington*, 330 U.S. 183, 190 (1947); see *ibid.* ("It is a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation.").

Here, the court of appeals noted the general rule that dismissals for lack of subject matter jurisdiction are not entitled to res judicata effect, but it did not cite any cases actually applying that rule in the context of a dismissal on sovereign immunity grounds. In fact, numerous judicial decisions establish that a dismissal on sovereign immunity grounds operates as a dismissal "on the merits" when the immunity reflects a substantive limitation on the government's liability (as it does here, see pp. 13-17, *supra*).[11] As the Ninth

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[11] See, *e.g.*, *Flores* v. *Edinburg Consol. Indep. Sch. Dist.*, 741 F.2d 773, 775 n.3 (5th Cir. 1984) ("A summary judgment on grounds of sovereign immunity is," under Texas law, "a judgment on the merits for purposes of res judicata."); *Kutzik* v. *Young*, 730 F.2d 149, 151 (4th Cir. 1984) ("In Maryland, a dismissal based on a defense of sovereign immunity meets the final judgment requirement for application of claim preclusion."); *Bloomquist* v. *Brady*, 894 F. Supp. 108, 116 (W.D.N.Y. 1995) ("A dismissal based on sovereign immunity is a decision on the merits, as it determines that a party has no cause of action or substantive right to recover against the United States."); *Beaver* v. *Bridwell*, 598 F. Supp. 90, 93 (D. Md. 1984); *Mills* v. *Lincoln Cnty.*, 864 P.2d 1265, 1266-1267

Circuit explained in an FTCA case, whereas, "[o]rdinarily, a case dismissed for lack of subject matter jurisdiction should be dismissed without prejudice so that a plaintiff may reassert his claims in a competent court," if, because of the discretionary function exception, "the bar of sovereign immunity is absolute [and] no other court has the power to hear the case," the case is properly dismissed "with prejudice." *Frigard* v. *United States*, 862 F.2d 201, 204 (1988) (citation omitted), cert. denied, 490 U.S. 1098 (1989); see *Midwest Knitting Mills, Inc.* v. *United States*, 741 F Supp. 1345, 1352 (E.D. Wis. 1990) (same), aff'd, 950 F.2d 1295 (1991).[12]

In this case, the dismissal of respondent's FTCA action on the basis of Section 2680(a) did not reflect merely "the distribution of judicial power among the various courts." *Angel*, 330 U.S. at 190. Rather, it effectuated an affirmative congressional determination to impose a substantive limit on "[t]he liability of

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(Mont. 1993); *Annapolis Urban Renewal Auth.* v. *Interlink, Inc.*, 405 A.2d 313, 317 (Md. Ct. Spec. App. 1979); *Herring* v. *Texas Dep't of Corr.*, 500 S.W.2d 718, 720 (Tex. Civ. App. 1973), aff'd, 513 S.W.2d 6 (Tex. 1974).

[12] Two other courts of appeals have, in dictum in the context of deciding which Federal Rule of Civil Procedure should govern a Section 2680 dismissal, expressed a view on whether an FTCA judgment in the government's favor on the basis of a Section 2680 exception would have res judicata effect. See *Williams* v. *United States*, 50 F.3d 299, 304-305 (4th Cir. 1995) (dismissal on Section 2680 grounds should be under Rule 12(b)(1) because "dismissal for jurisdictional defects has no *res judicata* effect"); *Wheeler* v. *Hurdman*, 825 F.2d 257, 259 & n.5 (10th Cir.) (FTCA exceptions should be decided under Rule 56, rather than Rule 12(b)(1), because it would then have claim preclusive effect), cert. denied, 484 U.S. 986 (1987). Neither decision, however, contains any sustained analysis of the issue.

the United States under the FTCA." *Gaubert*, 499 U.S. at 322; see pp. 13-17, *supra*. Where, as here, the basis of the dismissal, even if phrased in jurisdictional terms of sovereign immunity, reflects "a significant substantive policy" determination that, "as a substantive matter, the plaintiff cannot maintain his cause of action," the dismissal is "a judgment on the merits" with claim preclusive effect. *Annapolis Urban Renewal*, 405 A.2d at 318-319 (quoting *Weston Funding Corp.* v. *Lafayette Towers, Inc.*, 550 F.2d 710, 714 (2d Cir. 1977). Thus even if it were appropriate to limit the scope of the judgment bar by reference to common law principles, the bar would still apply to FTCA judgments obtained under Section 2680.

II. THE COURT OF APPEALS' DECISION WARRANTS REVIEW BY THIS COURT

A. The Court Of Appeals' Decision Squarely Conflicts With Decisions Of The Seventh And Ninth Circuits

Like the analogous Second Circuit decision in *Hallock* v. *Bonner*, 387 F.3d 147 (2d Cir. 2004), vacated on other grounds *sub nom. Will* v. *Hallock*, *supra*, the decision of the Sixth Circuit directly conflicts with the decisions of two other circuits that have considered the precise question presented here. See Pet., *Will*, *supra* (No. 04-1332), at 14-15 (describing circuit conflict). In *Will*, this Court granted certiorari to address this circuit conflict, but the Court ultimately held that the court of appeals in that case lacked jurisdiction over the interlocutory appeal, and it did not resolve the conflict. 546 U.S. at 349. The present case does not suffer from a comparable procedural impediment. It is therefore an appropriate vehicle in which to address the split of authority.

The Seventh and Ninth Circuits have each held that the judgment bar applies where the prior FTCA judgment was based on a determination that the United States was not liable due to one of the FTCA exceptions set forth in 28 U.S.C. 2680. In *Pesnell* v. *Arsenault*, 543 F.3d 1038 (2008) the Ninth Circuit applied the judgment bar to foreclose a subsequent *Bivens* claim when the FTCA action was dismissed under 28 U.S.C. 2680(h), which exempts the United States from liability for claims alleging misrepresentation. 543 F.3d at 1046 (Clifton, J., concurring). The court held that the judgment bar covers FTCA judgments—such as those based on the Section 2680 exceptions—that reflect a decision by Congress to "explicitly carve[] out an exception to its waiver of sovereign immunity," and thus to "flatly reject[] liability" for a category of claims. *Ibid.*; see *id.* at 1042 (opinion for court endorsing Judge Clifton's analysis).[13] That holding is consistent with the Ninth Circuit's prior holding in *Gasho*, 39 F.3d at 1436-1438, where the court concluded that Section 2676's unconditional language applies to "*any* FTCA judgment," including a judgment based on the detention-of-goods exception to FTCA liability set forth in 28 U.S.C. 2680(c). 39 F.3d at 1437; see *id.* at 1433-1434, 1436-1438.

The Seventh Circuit also applies the judgment bar to FTCA dismissals based on the Section 2680 excep-

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[13] The *Pesnell* court distinguished such FTCA judgments from those based on curable procedural defects, which reflect Congress's decision to "accept[] possible liability [under the FTCA]," but to "channel[] the claims in a specific way." 543 F.3d at 1046 (Clifton J., concurring) (noting that an FTCA judgment based on a claimant's failure to exhaust administrative remedies does not trigger the judgment bar); see note 7, *supra* (discussing *Pesnell*).

tions. See, *e.g.*, *Williams* v. *Fleming*, 597 F.3d 820, 823-824 (2010) (applying judgment bar to dismissal under Section 2680(h)); *Hoosier Bancorp*, 90 F.3d at 184 (applying judgment bar to dismissal under Section 2680(a)). As noted above, that court—alone among the courts of appeals—takes the view that the Section 2680 exceptions to liability do not operate as jurisdictional constraints on the authority of district courts over FTCA cases. See *Williams*, 597 F.3d at 824; *Collins* v. *United States*, 564 F.3d 833, 837-838 (7th Cir. 2009). In the Seventh Circuit's view, the fact that a Section 2680 dismissal is not jurisdictional means that it is "on the merits"—and thus that it triggers the FTCA judgment bar. *Williams*, 597 F.3d at 824.

The court of appeals in this case noted that *Williams* had "expressly punted" on the question of whether "dismissal of an FTCA claim for a lack of subject-matter jurisdiction qualified as a judgment under [Section] 2676." App., *infra*, 8a-9a (citing *Williams*, 597 F.3d at 822 n.2). But *Williams* did *not* "punt" on the question presented in this petition, namely, whether the dismissal of an FTCA case under the Section 2680 exceptions triggers the judgment bar. On the contrary, the Seventh Circuit expressly held that because such a dismissal is "on the merits," the judgment bar therefore forecloses any subsequent *Bivens* action. 597 F.3d at 824.

In short, there is no question that if this case had arisen in either the Seventh or Ninth Circuits, respondent's Eighth Amendment *Bivens* claim would have been dismissed pursuant to the judgment bar. This Court's intervention is warranted to resolve the

clear conflict of authority among the courts of appeals.[14]

B. The Petition Presents A Recurring Question Of Considerable Importance Regarding The Personal Liability Of Federal Employees For Acts Taken In The Course Of Their Employment

This Court's review is warranted to resolve the conflict between the Sixth Circuit's decision and the decisions of the other courts of appeals identified above, and because the court of appeals' decision will otherwise undermine the purposes the judgment bar was intended to serve. The judgment bar reflects Congress's recognition that successive litigation of related claims imposes considerable burdens on the government, as well as on federal employees subject to suit for acts taken within the scope of their employment. See *Gasho*, 39 F.3d at 1437 ("Congress * * * was concerned about the [g]overnment's ability to marshal the manpower and finances to defend subsequent suits against its employees."). The decision of the court of appeals significantly reduces the effec-

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[14] The district courts are also divided over the proper application of the judgment bar to FTCA judgments of dismissal under Section 2680. Some of those courts—like the Second Circuit in *Hallock*, and the Sixth Circuit in this case—have refused to apply the judgment bar to judgments based on Section 2680. See, *e.g.*, *Addison* v. *Arnett*, No. CV213-71, 2015 WL 1259263, at *1 (S.D. Ga. Mar. 18, 2015) (relying on Second Circuit's decision in *Hallock*); *Pellegrino* v. *United States Transp. Sec. Admin.*, No. 09-5505, 2014 WL 1489939, at *8-*9 (E.D. Pa. Apr. 16, 2014) (same). Others have made clear that the judgment bar does apply in such circumstances. See, *e.g.*, *Gibson* v. *FBI*, No. 11-CV-00936, 2014 WL 4926184, at *8 (N.D. Ala. Sept. 30, 2014) (following *Pesnell* and *Williams*, rejecting *Hallock*, and applying judgment bar to FTCA judgment of dismissal under Section 2680).

tiveness of the judgment bar. Because so many of the Government's defenses under the FTCA may be characterized as "jurisdictional," the decision would deprive a very large number of FTCA judgments of their preclusive effect.

Indeed, even cases that have consumed considerable governmental resources, such as cases that have gone to summary judgment or trial on defenses such as the discretionary function exception, might, under a rule based upon a jurisdictional/non-jurisdictional distinction, be considered a "nullity" for purposes of the judgment bar. The only alternative would be to have the application of the judgment bar turn solely on the stage of the proceedings or the caption of the dispositive motion. None of those rules can be reconciled with either the text or the purposes of Section 2676. This Court should grant review to correct the court of appeals' erroneous limitation of this important federal statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2015

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 13-4212

WALTER J. HIMMELREICH, PLAINTIFF-APPELLANT

v.

FEDERAL BUREAU OF PRISONS, ET AL., DEFENDANTS

J. FITZGERALD, ET AL., DEFENDANTS-APPELLEES

Decided and Filed: Sept. 9, 2014

OPINION

Appeal from the United States District Court for the Northern District of Ohio at Youngstown
No. 4:10-cv-02404—John R. Adams, District Judge

Before: COLE, Chief Judge; MOORE and GIBBONS, Circuit Judges

PER CURIAM. In 2010, Walter J. Himmelreich—a federal prisoner—filed a complaint against numerous defendants, alleging several causes of action. The district court dismissed the complaint for failure to state a claim. On appeal, in Case No. 11-3474, we affirmed the dismissal of the majority of the claims and defendants, but

we vacated and remanded two claims for further proceedings: a claim of retaliation in violation of the First Amendment based on Himmelreich's placement in administrative detention for sixty days in 2009, allegedly in retaliation for his filing of a claim under the Federal Tort Claims Act ("FTCA"); and a claim of failure to protect in violation of the Eighth Amendment based on an assault on Himmelreich by another inmate in 2008. On remand, the remaining defendants moved for summary judgment, arguing that Himmelreich had failed to exhaust his administrative remedies on the two claims at issue and that his Eighth Amendment claim was barred because he had elected to file a claim under the FTCA regarding the assault incident. The district court found the defendants' arguments to be valid and granted their motion for summary judgment. Himmelreich now appeals pro se, and we unanimously agree that oral argument is not needed. Fed. R. App. P. 34(a). For the reasons stated below, we conclude that Himmelreich's failure to exhaust hisadministrative remedies should have been excused and that the FTCA's judgment bar does not apply to this case. Consequently, we once again **VACATE** the district court's judgment and **REMAND** the case for further proceedings consistent with this opinion.

I.

The Prison Litigation Reform Act ("PLRA"), 110 Stat. 1321-71, 42 U.S.C. § 1997e(a), prevents a prisoner from filing suit "with respect to prison conditions until such administrative remedies as are available are ex-

hausted." In *Woodford v. Ngo*, 548 U.S. 81 (2006), the Supreme Court interpreted this language as requiring "proper exhaustion," meaning that a prisoner must "make full use of the prison grievance process" and "compl[y] with the system's critical procedural rules." *Id.* at 93-95. There are few exceptions to this strict rule, but we have excused a prisoner's lack of complete compliance when the improper actions of prison officials render the administrative remedies functionally unavailable. *See generally Brock v. Kenton Cnty.*, 93 F App'x 793, 798 (6th Cir. 2004) (collecting cases).

Himmelreich admits that he did not complete all of the steps in the prison grievance process, but he claims to have been "intimidated by Captain Fitzgerald into not filing any more Administrative Remedies" with regard to his Eighth Amendment claim against the B-Unit Disciplinary Team. R. 47 at 10 (Pl.'s Resp. to Mot. for Summ. J.) (Page ID #278). In determining whether Himmelreich fits within this exception, we must ask whether Captain Fitzgerald's threats and actions would "deter a person of ordinary firmness from [continuing with the grievance process]." *See Thaddeus-X v. Blatter*, 175 F.3d 378, 396 (6th Cir. 1999) (en banc) (internal quotation marks omitted); *Bell v. Johnson*, 308 F.3d 594, 603 (6th Cir. 2002).

Himmelreich alleges that Captain Fitzgerald told him that if Himmelreich continued with his grievances regarding the attack, "[she would] personally see that [Himmelreich was] transferred to a penitentiary and [he

would] more than likely be attacked and not just beat up." R. 47 at 7 (Pl.'s Resp. to Mot. for Summ. J.) (Page ID #275). When Himmelreich filed his FTCA lawsuit, he claimed that Captain Fitzgerald followed through with her threats and placed him in the Special Housing Unit ("SHU"). *Id.* at 11 (Page ID #279). Once Himmelreich was put in the SHU, Captain Fitzgerald allegedly yelled, "'You want to know why you're in here? You're in here because of the fuckin' Tort Claim you filed! That's why you're in here!'" R. 1 at 15 (Compl. at ¶ 66) (Page ID #15).

Unlike the vague and conclusory allegations at issue in *Boyd v. Corrections Corp. of America*, 380 F.3d 989, 997 (6th Cir. 2004), Himmelreich's claims of intimidation are specific. If Himmelreich's allegations are true, which we must assume at this stage in the litigation, *Risher v. Lappin*, 639 F.3d 236, 240 (6th Cir. 2011), a reasonable jury could conclude that Captain Fitzgerald's actions and statements would deter a person of ordinary firmness from continuing with the grievance process. Accordingly, we conclude that Himmelreich has demonstrated that a genuine issue of material fact exists as to whether Captain Fitzgerald improperly prevented Himmelreich from exhausting his administrative remedies.

In reaching this conclusion, we reject the government's argument that Himmelreich's filing of other administrative complaints and the FTCA lawsuit near the time that he claims to have been threatened prevents a finding of intimidation. We do not believe that minor

complaints related to "requests to watch [the] *Passion of the Christ* movie," R. 45-4 at 2 (Grievance Record) (Page ID #251), and to requests "to make a [weekly] call to [his] parents while in [the] SHU," *id.* at 11 (Page ID #260), are relevant when Captain Fitzgerald purportedly told Himmelreich "that if he didn't stop [with his complaints about the assault] she would ship him to an ADX [higher-security prison], or better yet, to a [penitentiary] where she knows he will get shanked and probably killed," R. 1 at 14 (Compl. at ¶ 59) (Page ID #14). Complaints and grievances related to petty requests and those related to prison-official misconduct are wholly different, particularly when there are specific allegations in the record that Captain Fitzgerald actually retaliated against Himmelreich for filing grievances and lawsuits related to a specific assault. In our view, this retaliation and intimidation—if proven true—would render the grievance process functionally unavailable for a person of ordinary firmness. Thus, we **VACATE** the district court's grant of summary judgment on the basis of a failure to exhaust.

II.

The district court also found that the FTCA's judgment bar, 28 U.S.C. § 2676, applied in this case and, for this alternative reason, granted the government summary judgment with respect to Himmelreich's Eighth Amendment claim. Section 2676 states in full: "The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee

of the government whose act or omission gave rise to the claim." According to the district court, "[t]he plain language of section 2676 requires that the bar apply to all actions by the Plaintiff, not just judgments on the merits." R. 53 at 6-7 (D. Ct. Op.) (Page ID #436-37) (citing *Manning v. United States*, 546 F.3d 430, 437-38 (7th Cir. 2008)). We disagree.

A careful reading of the record shows that the district court dismissed Himmelreich's FTCA action for a lack of subject-matter jurisdiction. R. 34 at 2-5 (D. Ct. Rule 12(b)(1) Op.) (Page ID #171-74) (Case Number 4:10-cv-307); *see also* R. 31 at 1 (Gov't Rule 12(b)(1) Mot.) (Page ID #136) (Case Number 4:10-cv-307). Specifically, the district court found that the discretionary-function exception applied, which deprived the district court of subject-matter jurisdiction. Therefore, the district court granted the government's Rule 12(b)(1) motion and dismissed the action for a lack of jurisdiction. R. 34 at 2-5 (D. Ct. Rule 12(b)(1) Op.) (Page ID #171-74) (Case Number 4:10-cv-307).

A dismissal for lack of subject-matter jurisdiction does not trigger the § 2676 judgment bar. Put bluntly, in the absence of jurisdiction, the court lacks the power to enter judgment. *See* 10A Charles Alan Wright, Arthur Miller, & Mary Kay Kane, *Federal Practice & Procedure* § 3713 (3d ed. 1998) ("If the court has no jurisdiction, it has no power to enter a judgment on the merits and must dismiss the action."). Because we hold that district courts lack subject-matter jurisdiction over an FTCA claim when the

discretionary-function exception applies, as it did here, *see Kohl v. United States*, 699 F.3d 935, 939-40 (6th Cir. 2012), we do not view the district court's dismissal of Himmelreich's previous action as implicating the FTCA's judgment bar. Accordingly, we conclude that the district court erred in citing the judgment bar as an independent basis for granting summary judgment on Himmelreich's Eighth Amendment claim. *See* R. 53 at 6-7 (D. Ct. Op.) (Page ID #436-37).

In reaching its conclusion, the district court relied upon *Harris v. United States*, 422 F.3d 322 (6th Cir. 2005), and *Manning*, 546 F.3d 430, but it misreads both of these cases. In *Harris*, the plaintiff simultaneously filed *Bivens* and FTCA claims against the United States and government officials. 422 F.3d at 324. The district court "entered a 'judgment' on the merits of [the] FTCA claims," and we concluded that this judgment barred consideration of the plaintiff's *Bivens* claim. *Id.* at 334. Specifically, we held that § 2676 "fails to draw a distinction between a decision for or against the government" and that § 2676 bars a *Bivens* action regardless of which party prevailed on the merits of the FTCA claim. *Id.* at 334-35. Holding that a judgment on the merits, irrespective of who won, triggers the judgment bar is a far cry from holding that any disposition of an FTCA action prevents other suits, a distinction that the *Harris* panel explicitly recognized by citing *Hallock v. Bonner*, 387 F.3d 147, 155 (2d Cir. 2004), *reversed on other grounds sub nom. Will v. Hallock*, 546 U.S. 345 (2006). *See Har-*

ris, 422 F.3d at 335. In *Hallock*, the Second Circuit stated that "an action brought under the FTCA and dismissed for lack of subject matter jurisdiction because it falls within an exception to the restricted waiver of sovereign immunity provided by the FTCA does not result in a 'judgment in an action under section 1346(b) [the Federal Tort Claims Act].'" 387 F.3d at 155 (quoting 28 U.S.C. § 2676).[1] *Harris* described this precise holding in a parenthetical and cited the case approvingly. 422 F.3d at 335.

Manning does not hold to the contrary or support the district court's statement that "[t]he plain language of section 2676 requires that the bar apply to all actions by the Plaintiff, not just judgments on the merits." R. 53 at 6-7 (D. Ct. Op.) (Page ID #436-37) (citing *Manning*, 546 F.3d at 437-38). In *Manning*, the plaintiff "concede[d] that the district court entered a 'judgment' on the merits of his FTCA claim" (a fact that we believe renders *Manning* completely irrelevant to this case). 546 F.3d at 433. Nonetheless, in that case, the plaintiff argued that the judgment bar could not be "appl[ied] retroactively to nullify a *previous Bivens* judgment." *Id.* The Seventh Circuit disagreed and applied the § 2676 judgment bar

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[1] *See also Pellegrino v. U.S. Transp. Sec. Admin.*, No. 09-5505, 2014 WL 1489939, at *8-9 (E.D. Pa. April 16, 2014); *Saleh v. Wiley*, No. 09-cv-02563-PAB-KLM, 2012 WL 4356224, at *3-4 (D. Colo. June 12, 2012); *Kyei v. Beebe*, No. CV 01-1266-PA, 2005 WL 3050442, at *2 n.3 (D. Or. Nov. 13, 2005).

retroactively. *Id.* at 438. Nowhere did the Seventh Circuit hold in *Manning* that a dismissal of an FTCA claim for a lack of subject-matter jurisdiction qualifies as a judgment under § 2676. In *Williams v. Fleming*, 597 F.3d 820 (7th Cir. 2010), the Seventh Circuit expressly punted on that question, the one before us now, stating: "[w]e need not address [the] contention [that any dismissal, whether or not on the merits, suffices for application of § 2676] today. " *Id.* at 822 n.2.

Moreover, the Seventh Circuit's disposition of this question, in particular, is unhelpful. The Seventh Circuit treats the dismissal of an FTCA action due to the application of the discretionary-function exception as a decision on the merits. *See Collins v. United States*, 564 F.3d 833, 837-38 (7th Cir. 2009). We have repeatedly taken the opposite view, which is that we lack subject-matter jurisdiction over an FTCA claim if the discretionary-function exception applies in a given case. *See, e.g., Kohl*, 699 F.3d at 939-40; *Milligan v. United States*, 670 F.3d 686, 695 (6th Cir. 2012) ("[I]t is evident that the discretionary function exception bars subject matter jurisdiction for the [plaintiffs'] claims."). In other cases, a dismissal for a lack of subject-matter jurisdiction carries no preclusive effect. *See, e.g., Marrese v. Am. Academy of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985); *Wilkins v. Jakeway*, 183 F.3d 528, 533 n.6 (6th Cir. 1999); Restatement (Second) of Judgments § 26(1)(c) (1982). We see no reason to depart from that general rule in this situation.

In *Harris*, we also noted that the purpose of a judgment bar is to prevent the possibility of double recoveries and the cost of defending multiple suits regarding the same conduct for the government. 422 F.3d at 335-36. It is not punitive in nature. Holding that a plaintiff's filing of an FTCA action, when that statute does not permit recovery, prevents the plaintiff from alleging the correct cause of action furthers neither of these interests. Seeing no compelling reason in the text or purpose of § 2676 to conclude that a dismissal for a lack of jurisdiction triggers the judgment bar, we hold that the district court erred in applying the judgment bar here and **VACATE** its decision accordingly.

III.

For the forgoing reasons, we **VACATE** the district court's grant of summary judgment and **REMAND** for proceedings consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 13-4212

WALTER J. HIMMELREICH, PLAINTIFF-APPELLANT

v.

FEDERAL BUREAU OF PRISONS, ET AL., DEFENDANTS

J. FITZGERALD, ET AL., DEFENDANTS-APPELLEES

[Filed: Mar. 10, 2015]

ORDER

BEFORE: COLE, Chief Judge; MOORE and GIBBONS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

Further, Himmelreich moves for an award of costs pursuant to Fed. R. App. P 39 in this appeal. The court vacated the summary judgment for defendants and remanded for further proceedings. Where a judgment is vacated, the award of costs is discretionary. Fed. R. App. P 39(a)(4). Because Himmelreich has not yet prevailed on his claims, we deny the motion. In the event he is successful below, he may seek recovery of the appellate filing fee in district court under Fed. R. App. P 39(e)(4).

ENTERED BY ORDER OF THE COURT

/s/ DEBORAH S. HUNT
DEBORAH S. HUNT, CLERK

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4: 10-CV-02404

WALTER J. HIMMELREICH, PLAINTIFF

v.

FEDERAL BUREAU OF PRISONS, ET AL., DEFENDANT

[July 18, 2013]

ORDER AND DECISION

Judge JOHN R. ADAMS

I. INTRODUCTION

Defendants J. Fitzgerald, Lieutenant Butts, Correctional Officer Simmons, Ms. Bunts and Ms. Newland, request that this Court grant summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure. This Court finds that Walter J. Himmelreich has not exhausted his administrative remedies with respect to his claims in this lawsuit. Summary judgment is therefore GRANTED.

II. SUMMARY OF FACTS AND BACKGROUND

Plaintiff is an inmate at the Federal Correction Institution in Elkton, Ohio. He filed his original Complaint on October 21, 2010. On March 9, 2011 this Court dismissed the case. Plaintiff appealed to the Sixth Circuit and it affirmed in part, reversed in part and remanded to this Court on May 7. 2012.

The remanded claims revisited by this Court are Constitutional claims based on the First and Eighth Amendment. The First Amendment retaliation claim is grounded in Plaintiff's allegation that he was improperly placed in administrative segregation in March 2009. Plaintiff sees his placement in administrative confinement as illegal retaliation by FCI Elkton staff for his filing of an administrative tort claim. The Eighth Amendment claim is based on Plaintiff's assertion that prison officials, specifically the B-Unit Disciplinary Team, failed to protect him from another inmate. Plaintiff alleges that the other inmate verbally threatened to physically-assault a pedophile. Plaintiff further alleges "that the Plaintiff is reputedly, among the inmate community, one of the biggest pedophiles on the Elkton compound and is aware that other inmates have that perception of him." Doc. 1 at 6. The B-Unit Disciplinary Team then placed the other inmate into the general population despite allegedly being aware of the threat. Plaintiff sees this lack of action as a failure to protect him from serious harm and therefore a violation of the Eighth Amendment. Both claims are

made pursuant to *Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

III. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Estate of Smithers v. City of Flint*, 602 F.3d 758, 761 (6th Cir. 2010). A fact must be essential to the outcome of a lawsuit to be 'material.' *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). Summary judgment must be entered when a party fails to make a "showing sufficient to establish an element essential to that party's case." *Celotex*, 477 U.S. at 322-23. "Mere conclusory and unsupported allegations, rooted in speculation, do not meet [the] burden." *Bell v. Ohio State Univ.*, 351 F.3d 240, 253 (6th Cir. 2003).

Summary judgment creates a burden-shifting framework. *See* Anderson, 477 U.S. 250. The moving party has the initial burden of showing there is no genuine issue of material fact. *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 934 (6th Cir. 2000). The burden then shifts to the nonmoving party to prove that there is an issue of material fact that can be tried. *Id.* If this burden is not met, the moving party is then entitled to a judgment as a matter of law. *Bell*, 351 F.3d at 253. The court must view the evidence in the light most favorable to the nonmoving

party when considering the motion. *Hamilton v. General Elec. Co.*, 556 F.3d 428, 433 (6th Cir. 2009).

IV. ANALYSIS

An inmate must fully exhaust his administrative remedies before seeking relief in a *Bivens* case under the Prison Litigation Reform Act ("PLRA"). 42 U.S.C. § 1997(e)(a); *Porter v. Nussle*, 534 U.S. 516, 532 (2002); *Booth v. Churner*, 532 U.S. 731, 741 (2001). "Exhaustion is no longer left to the discretion of the district court, but is mandatory." *Woodford v. Ngo*, 548 U.S. 81, 85 (2006). This process is set out for Bureau of Prisons ("BOP") inmates in 28 C.F.R. § 542.10 *et seq.* For a complaint that relates to any aspect of the inmate's life, the BOP follows this process through various steps. *Id.* The process includes multiple levels of appeal up through BOP's hierarchy of review. *Id.* The United States Supreme Court unanimously held that Congress has permissibly chosen to mandate the completion of a prison administrative remedy process that may address the inmate's complaint and provide some form of relief. *See Booth*, 532 U.S. at 741; *See also, Hampton v. Hobbs*, 106 F.3d 1281, 1288 (6th Cir. 1997) (finding the administrative remedy requirements of the PLRA do not violate an inmate's right to procedural due process).

"The point of the PLRA exhaustion requirement is to allow prison officials 'a fair opportunity' to address grievances on the merits, to correct prison errors that can and should be corrected and to create an administrative rec-

ord for those disputes that eventually end up in court." *Reed-Bey v. Pramstaller*, 603 F.3d 322, 324 (6th Cir. 2011); (quoting *Woodford*, 548 U.S. at 94-95). Additionally, the Court held that the PLRA's exhaustion requirement applies to all inmate suits concerning prison life. *Porter*, 534 U.S. at 516.

Furthermore, it is Defendant's burden to prove exhaustion has not occurred. *Napier v. Laurel County, Ky.*, 636 F.3d 218, 225 (6th Cir. 2011). Failure to exhaust administrative remedies is an affirmative defense. *Jones v. Bock*, 549 U.S. 199, 216 (2007). Plaintiff is not required to plead or show exhaustion in his complaint. *Id. Bock*, therefore, only reduces the pleading standard for inmates; proper exhaustion is still required under the PLRA. *Id.* at 218.

A. Plaintiff Has Not Exhausted His Administrative Remedies For His First Amendment Claim.

The record indicates that Plaintiff has filed eighty administrative remedy requests while incarcerated. He has exhausted only eighteen of them. None of the exhausted requests concern either claim remaining in this case. Defendant has produced clear records and the Declaration of a BOP attorney to corroborate these facts. Plaintiff has indicated that he wrote a letter to Northeast Regional Counsel, Henry Sadowski, Esq., concerning his First Amendment claim, but there is no other indication that Plaintiff completed or even engaged in the required administrative remedy process in reference to this claim.

Courts only excuse an inmate's lack of compliance with the exhaustion requirement when administrative remedies are deemed unavailable because of the improper actions of prison officials. *Brock v. Kenton County*, 93 Fed. App'x 793, 798 (6th Cir. 2004). A prisoner is still required to demonstrate his affirmative actions to comply with administrative remedy before a court can analyze if the administrative remedies actually were unavailable. *Id.* at 798.

Plaintiff fails to show any affirmative efforts to comply with the administrative remedy procedure required by *Porter* and *Woodford*. The record indicates that Plaintiff has made notes and wrote a letter to Mr. Sadowski, but these efforts do not satisfy the administrative remedy process. *See Woodford*, 548 U.S. at 94-95. Plaintiff took no further action to exhaust the administrative remedy process up through the appeals process. There is no genuine issue of material fact that Plaintiff has not satisfied the administrative remedy process for his First Amendment Claim. Accordingly, he has failed to exhaust his First Amendment claim.

B. Plaintiff Has Not Exhausted the Administrative Remedy Process for His Eighth Amendment Claim.

Again, a plaintiff must exhaust all administrative remedies before seeking relief at the district court level. *Woodford*, 548 U.S. at 85. The record shows that Plaintiff fails to exhaust the administrative remedy process for his Eighth Amendment claim in the same way that he

failed to do so for his First Amendment claim. Plaintiff contends that he exhausted the administrative remedy process by filing an administrative tort claim under the Federal Tort Claims Act ("FTCA").

Filing a claim under the FTCA does not exhaust the administrative remedy process in regard to Plaintiff's *Biven's* claims. *Macias v. Zenk*, 495 F.3d 37, 44 (2d Cir. 2007); *Adekoya v. Fed. Bureau of Prisons*, 375 F.App'x 119, 121 (2d Cir. 2010); *Ramos v. Hawk-Sawyer*, 212 F App'x 77, 79 (3d Cir. 2006). A claim under the FTCA and a *Bivens* claim under the PLRA are two separate claims. *See Nwaokocha v. Sadowski*, 369 F Supp. 2d 363, 368 (E.D.N.Y. 2005) (holding "filing of an administrative tort claim does not excuse [Plaintiff's] failure to meet the separate exhaustion requirements for a *Bivens* claim under the PLRA"). The filing of a FTCA claim does not contemporaneously satisfy the exhaustion requirement of the PLRA. *Id.* Therefore, Plaintiff's filing of an FTCA claim does not exhaust his administrative remedies for his Eighth Amendment failure to protect claim.

C. Plaintiff's Claim of Intimidation Is Unsupported.

A plaintiff is excused from exhausting the administrative remedy process only if the plaintiff can prove administrative remedies were made unavailable to him. *Brock*, 93 F App'x at 798. An inmate's general allegation that he feared retaliation from the prison staff does not meet this standard. *Boyd v. Corrections Corp. of America*,

380 F.3d 989, 997-98 (6th Cir. 2004). An inmate must specifically describe the factual basis of his fear. *Id.* at 98.

Plaintiff alleges intimidation from the prison staff and that therefore administrative remedies were unavailable to him. The intimidation Plaintiff cites is an incident when Defendant Fitzgerald "yelled" at Plaintiff about the filing of administrative remedy requests stemming from the 2008 assault. Events following this conversation do not indicate that Plaintiff experienced intimidation or was dissuaded from using the administrative process following this conversation. According to BOP records, Plaintiff filed an administrative relief request after speaking with Fitzgerald. Plaintiff filed seven different unrelated administrative remedy requests or appeals during the time that he claims to have been intimidated by his conversation with Captain Fitzgerald. Additionally, between 2008 and 2010, Plaintiff filed 19 other administrative remedy requests. Based on the facts presented to this court, Plaintiff cannot be seen as intimidated by prison personnel considering his general allegation and continued filing of administrative remedy requests subsequent to his conversation with Fitzgerald. *See Boyd*, 380 F.3d at 797-98.

D. Plaintiff's Eight Amendment Claim Is Subject to the FTCA's Judgment Bar.

28 U.S.C. § 2676 provides, "judgment in an action under the [FTCA] shall constitute a complete bar to any action by the same claimant, by reason of the same sub-

ject matter, against the employee of the government whose act of omission gave rise to the claim." The Sixth Circuit interprets the phrase "by reason of the same subject matter" to mean, "arising out of the same actions, transactions or occurrences." *Serra v. Pichardo*, 786 F.2d 237, 239 (6th Cir. 1986). The bar applies to all judgments. *Harris v. United States*, 422 F.3d 322, 336 (6th Cir. 2005) (holding that the language of section 2676 does not "delimit the reach of the reach of a bar that applies to all judgments" depending on the identity of the victor in an FTCA claim). The plain language of section 2676 requires that the bar apply to all actions by the Plaintiff. not just judgments on the merits. *Manning v. United States*, 546 F.3d 430, 437-388 (7th Cir. 2008).

Section 2676's judgment bar is directly applicable to Plaintiff's Eighth Amendment claim. Plaintiff filed a separate lawsuit under the FTCA arising from the assault on Plaintiff in October 2008 and the prison staff's alleged failure to protect him from the assault. *Himmelreich v. United States of America*, N.D. Ohio, Case No. 4:10CV307. This Court granted summary judgment for the United States because the actions in controversy fell under the discretionary exception to the FTCA. *Id.*

Plaintiff's Eighth Amendment claim in this case arises out of the very same occurrence; the assault in 2008, and the same actions; the prison's alleged failure to protect. Section 2676 bars any further action on Plaintiff's Eighth Amendment failure to protect claim for this reason.

Therefore, section 2676 provides an additional basis for summary judgment on this claim.

V. CONCLUSION

Based on the reasons stated herein, Defendant's Motion for Summary Judgment is GRANTED. The complaint is DISMISSED. The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith.

IT IS SO ORDERED.

DATE: July 18, 2013

/s/ JOHN R. ADAMS
Judge JOHN R. ADAMS
UNITED STATES DISTRICT COURT

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 11-3474

WALTER J. HIMMELREICH, PLAINTIFF-APPELLANT

v.

FEDERAL BUREAU OF PRISONS, ET AL., DEFENDANTS,

Filed: May 7, 2012

ORDER

On Appeal from the United States District Court for the Northern District of Ohio

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Before: MOORE, COOK, and WHITE, Circuit Judges.

Walter J. Himmelreich, a federal prisoner proceeding pro se, appeals the district court's *sua sponte* dismissal of his civil rights action filed pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. This panel unanimously agrees that oral

argument is not needed. Fed. R. App. P 34(a). For the reasons articulated below, we vacate and remand in part and affirm in part.

Relying on *Bivens*, Himmelreich filed a complaint naming as defendants: the Federal Bureau of Prisons ("BOP") and twenty of its executives; U.S. Attorney General Eric Holder; the Federal Correctional Institution—Elkton ("FCI-Elkton"); FCI-Elkton Warden J.T. Shartle; two FCI-Elkton inmates; several of FCI-Elkton's security officers, medical staff, and administrative staff; ten unknown agents of the Federal Bureau of Investigation; and ten unknown employees of the Department of Justice's Freedom of Information Act Office. Himmelreich alleged that his constitutional rights were violated by events that occurred before, during, and after defendant-inmate Peter Macari physically assaulted him. Himmelreich's complaint sought monetary damages and various forms of injunctive relief.

In accordance with the Prison Litigation Reform Act ("PLRA"), the district court screened Himmelreich's complaint. The court dismissed the action because several of the named defendants could not be sued under *Bivens* and because Himmelreich had not pled a claim against the defendants amenable to a *Bivens* suit. After unsuccessfully moving the district court for reconsideration, Himmelreich appealed.

Governing Legal Principles

We review de novo a district court's decision to dismiss a complaint pursuant to the PLRA. *Hill v. Lappin*, 630 F.3d 468, 470 (6th Cir. 2010); *Grinter v. Knight*, 532 F.3d 567, 571-72 (6th Cir. 2008). Under 42 U.S.C. § 1997e and 28 U.S.C. §§ 1915(e) and 1915A, district courts are required "to screen and dismiss complaints that are frivolous or malicious, that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief." *Grinter*, 532 F.3d at 572 (citing 28 U.S.C. § 1915A(b)); *accord* 28 U.S.C. § 1915(e) and 42 U.S.C. § 1997e. Like the district court, we must "construe [a prisoner's] complaint in the light most favorable to him [and] accept his factual allegations as true." *Harbin-Bey v. Rutter*, 420 F.3d 571, 575 (6th Cir. 2005) (citation omitted). Factual allegations need not be set forth in great detail, but they must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Hill*, 630 F.3d at 470-71. Pro se complaints are "h[e]ld to less stringent standards than formal pleadings drafted by lawyers," and therefore are to be liberally construed. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

"In *Bivens*—proceeding on the theory that a right suggests a remedy—[the Supreme Court] 'recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights.'" *Iqbal*, 556 U.S. at 675 (quoting

Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001)). The *Bivens* Court specifically held that "violation of [the Fourth Amendment] by a federal agent acting under color of his authority gives rise to a cause of action for damages." 403 U.S. at 389. Subsequently, the Supreme Court has recognized very few constitutional rights that can be vindicated under *Bivens*. *See Iqbal*, 556 U.S. at 675 ("Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'" (quoting *Malesko*, 534 U.S. at 68)); *see also Minneci v. Pollard*, 565 U.S. __, 132 S. Ct. 617, 622-23 (2012) (collecting cases in which the Court declined to extend *Bivens*'s reach).

In *Davis v. Passman*, 442 U.S. 228 (1979), the Court recognized that a female deputy administrative assistant could claim damages under the Fifth Amendment's Due Process Clause against a Congressman who had fired her on the basis of her gender. And, in *Carlson v. Green*, 446 U.S. 14 (1980), the Court recognized an implied damages action against federal prison officials for violation of the Eighth Amendment. Although the Supreme Court has thus far "declined to extend *Bivens* to a claim sounding in the First Amendment," *Iqbal*, 556 U.S. at 675 (citing *Bush v. Lucas*, 462 U.S. 367 (1983)), our circuit has recently expressly permitted a federal prisoner's First Amendment retaliation claim to proceed under *Bivens*, *see Hill*, 630 F.3d at 471.

The Supreme Court has also restricted those who can be sued under *Bivens*. "If a federal prisoner in a BOP

facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer, subject to the defense of qualified immunity." *Malesko*, 534 U.S. at 72. But, "[t]he prisoner may not bring a *Bivens* claim against the officer's employer, the United States, or the BOP" *Id.* Nor can a *Bivens* claim be maintained on a theory of respondeat superior. *See Iqbal*, 556 U.S. at 676. And because "the real party in interest in an official-capacity suit is the entity represented and not the individual officeholder," *Karcher v. May*, 484 U.S. 72, 78 (1987), *Bivens* does not permit suits against government employees in their official capacities, *see Malesko*, 534 U.S. at 72 ("With respect to the alleged constitutional deprivation, [the plaintiff's] only remedy lies against the individual").

In short, to plausibly state a *Bivens* claim, "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution" in a manner that can be vindicated under *Bivens*. *Iqbal*, 556 U.S. at 676.

Discussion

Himmelreich assigns a litany of errors to the district court's dismissal of his complaint. Only two of his arguments are not frivolous. We begin with these two meritorious arguments.

First Amendment Retaliation

At the outset, the district court erred by analyzing Himmelreich's allegations solely as a due process viola-

tion rather than a violation of the First Amendment. The Supreme Court has instructed that "'if a constitutional claim is covered by a specific constitutional provision, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.'" *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) (quoting *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997)); *see Pasley v. Conerly*, 345 F. App'x 981, 984 & n.1 (6th Cir. 2009). We agree with Himmelreich's contention that he pled a First Amendment retaliation claim.

According to his complaint, in February 2009, Himmelreich filed a tort claim with the BOP seeking to recover for the injuries he sustained from the assault. In March 2009, Himmelreich "was placed in [segregation] without reason on his Administrative Detention Order." Sometime afterwards, FCI-Elkton Security Captain Fitzgerald yelled through Himmelreich's cell door: "You want to know why you're in here? You're in here because of the f***in' Tort Claim you filed! That's why you're in here!" Himmelreich remained in segregation for sixty days.

To establish a retaliation claim under the First Amendment, Himmelreich "must prove that (1) he engaged in protected conduct, (2) the defendant took an adverse action that is capable of deterring a person of 'ordinary firmness from continuing to engage in that conduct,' and (3) 'the adverse action was motivated at least in part by [Himmelreich's] protected conduct.'" *Hill*, 630

F.3d at 472 (quoting *Thaddeus-X v. Blatter*, 175 F.3d 378, 394, 398 (6th Cir. 1999) (en banc)). Liberally construing the complaint's allegations in the light most favorable to Himmelreich, *see id.* at 471, we conclude that he pled the three elements of a First Amendment retaliation claim.

First, Himmelreich engaged in protected conduct when he filed his administrative tort claim. *Hill*, 630 F.3d at 472. Second, Himmelreich's placement in segregation constitutes an adverse action. *Id.* at 474-75. Third, Captain Fitzgerald's alleged statement regarding why Himmelreich was in segregation supports a retaliatory motive. *Id.* at 476. As in *Hill*, Himmelreich's "inartfully" pled allegations "contained the elements of a First Amendment retaliation claim." *Id.* at 471; *see id.* at 471-72; *see also Pasley*, 345 F App'x at 984-86. Accordingly, the district court erred by not construing Himmelreich's allegations as stating a plausible First Amendment retaliation claim.

Eighth Amendment

Although the allegations in Himmelreich's complaint implicate the Eighth Amendment in two respects—failure to protect and inadequate medical care—he has only pleaded a claim upon which relief could be granted as to the first. To plead his failure-to-protect claim, Himmelreich must allege facts demonstrating that FCI-Elkton staff and security officers were deliberately indifferent "to a substantial risk of serious harm" to him. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). "Deliberate indif-

ference" is pleaded through allegations "'that the official was subjectively aware of the risk' and 'disregard[ed] that risk by failing to take reasonable measures to abate it.'" *Greene v. Bowles*, 361 F.3d 290, 294 (6th Cir. 2004) (quoting *Farmer*, 511 U.S. at 829, 847). Thus, Himmelreich must allege facts that permit the inference that FCI-Elkton staff and security officers were either (1) aware of a substantial risk to Himmelreich, even if they were unaware of who would commit the assault, or (2) aware that Macari posed a substantial risk to a class of prisoners, even though they were unaware of the exact prisoner at risk. *See id.* (citing *Curry v. Scott*, 249 F.3d 493, 507-08 (6th Cir. 2001)); *see also Farmer*, 511 U.S. at 843 ("[I]t does not matter whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk.").

Himmelreich alleges that Macari told members of the B-Unit Unit Disciplinary Team that he would "smash" an inmate who was a pedophile if he was returned to the general prison population. Himmelreich also alleges that the inmate community widely perceived him as a pedophile. Accordingly, the complaint alleges that defendant officials were subjectively aware that Macari posed a substantial risk to a class of prisoners of which Himmelreich was a member.[1] The complaint also alleges that the of-

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[1] The complaint does not specifically allege that Newland knew of Macari's threat. Without knowledge of the threat, failure to examine Macari's file and learn of his history of violence would at most support a finding of negligence rather than deliberate indif-

ficials disregarded that risk by releasing Macari back into the general population. Therefore, Himmelreich has pleaded an Eighth Amendment claim based on failure to protect, which should be allowed to proceed.

By contrast, the district court properly dismissed Himmelreich's Eighth Amendment claim based on allegedly inadequate medical treatment. In evaluating Eighth Amendment claims grounded on the medical treatment received, "'[w]e distinguish between cases where the complaint alleges a complete denial of medical care and those cases where the claim is that a prisoner received inadequate medical treatment.'" *Alspaugh v. McConnell*, 643 F.3d 162, 169 (6th Cir. 2011) (quoting *Westlake v. Lucas*, 537 F.2d 857, 860 n.5 (6th Cir. 1976)). When a prisoner grounds a constitutional violation on inadequate medical treatment, he states a viable claim only if his treatment was "'so woefully inadequate as to amount to no treatment at all.'" *Id.* (quoting *Westlake*, 537 F.2d at 860 n.5). But in cases "[w]here a prisoner alleges only that the medical care he received was inadequate, 'federal courts are generally reluctant to second

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ference. *See Farmer*, 511 U.S. at 835 ("[D]eliberate indifference describes a state of mind more blameworthy than negligence."). The district court was thus correct that Himmelreich has not pleaded a cause of action for violation of the Eighth Amendment against Newland. However, Himmelreich also named members of the B-Unit Disciplinary Team, who allegedly were aware of Macari's threat, as defendants in this lawsuit.

guess medical judgments.'" *Id.* (quoting *Westlake*, 537 F.2d at 860 n.5).

Here, Himmelreich's claim falls short of a constitutional violation. According to the allegations in his complaint, Himmelreich was examined by a nurse shortly after the assault. When he had difficulty breathing a few hours later, the same nurse re-examined him and a medical administrator authorized "a combination of Tylenol and Motrin for [Himmelreich's] pain and breathing difficulties." R.1 at 12, ¶ 51. Two days later, medical personnel performed a series of head and chest x-rays on Himmelreich. Thus, Himmelreich obviously received medical care for his injuries. And because his lawsuit, in essence, asks the court to "'second guess medical judgments,'" Himmelreich fails to state an Eighth Amendment claim based on inadequate medical care. *Alspaugh*, 643 F.3d at 169 (quoting *Westlake*, 537 F.2d at 860 n.5).

Miscellaneous

Himmelreich's remaining arguments need not detain us long. The district court properly dismissed the claims against the bulk of the defendants. The BOP and FCI-Elkton cannot be sued under *Bivens*. *See Malesko*, 534 U.S. at 72; *FDIC v. Meyer*, 510 U.S. 471, 486 (1994). Because Himmelreich alleged that Attorney General Holder and Warden Shartle were liable only due to their supervisory positions, they cannot be sued under *Bivens* either. *See Iqbal*, 556 U.S. at 676. And it is well-settled that only actual government employees—not federal inmates—can

be sued under *Bivens*. *See id.* at 675-76; *Malesko*, 534 U.S. at 72; *Meyer*, 510 U.S. at 486. Furthermore, Himmelreich cannot sue under *Bivens* for a refund of his medical co-pay. *See Iqbal*, 556 U.S. at 675-76. Nor can a *Bivens* claim be used to compel the government to bring assault charges against Macari. *See id.* Finally, Himmelreich should not have been given an opportunity to amend his complaint before the district court *sua sponte* dismissed his case. We have clearly held that when a complaint is subjected to PLRA screening, "the district courts are not to permit plaintiffs to amend a complaint to avoid dismissal pursuant to [the PLRA's] provisions." *Benson v. O'Brian*, 179 F.3d 1014, 1016 (6th Cir. 1999); *see Moniz v. Hines*, 92 F App'x 208, 211-12 (6th Cir. 2004).

For the foregoing reasons, we vacate the district court's judgment on Himmelreich's First Amendment retaliation claim and Eighth Amendment failure-to-protect claim, and remand this claim for further proceedings not inconsistent with this order. We affirm the judgment in all other respects. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ [ILLEGIBLE]
Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Case No. 4:10 CV 2404

WALTER J. HIMMELREICH, PLAINTIFF

v.

FEDERAL BUREAU OF PRISONS, ET AL., DEFENDANTS

Filed: Mar. 9, 2011

MEMORANDUM OF OPINION AND ORDER

Judge JOHN R. ADAMS

Pro se Plaintiff Walter J. Himmelreich filed this *Bivens*[1] action against the United States Bureau of Prisons ("BOP"), the Elkton Federal Correctional Institution ("FCI Elkton"), Federal Inmate Peter B. Macari, Federal Inmate Roger Oberkramer, former FCI Elkton Security Captain J. Fitzgerald, FCI Elkton SIS Security Officer Lieutenant Butts, FCI Elkton Corrections Officer Simmons, FCI Elkton Health Care Administrator Bunts,

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[1] *Bivens v. Six Unknown Agents*, 403 U.S. 383 (1971).

FCI Elkton Psychology Department Staff Physician Dr. Lefever, FCI Elkton Nurse Newland, FCI Elkton Warden J.T. Shartle, and United States Attorney General Eric Holder. In the Complaint, Himmelreich alleges he was physically assaulted by two other inmates. He seeks monetary damages.

Background

Himmelreich alleges he and Oberkramer got into a verbal altercation on October 11, 2008. Oberkramer told Himmelreich that he was going to put his head through the glass door of the TV room. Upon seeing the surveillance cameras, he told Himmelreich he would retaliate at a time and place where he would not be observed. Himmelreich claims he could not find an opportunity to have a private conversation with a security officer to convey the threat.

At the time this verbal altercation occurred, Macari was in disciplinary segregation. Macari was scheduled to be released from segregation on October 14, 2008, but refused to go to the general population claiming he was experiencing a great deal of stress. He proclaimed he would not be able to live with pedophiles and would "smash" one if forced to return to the general population. (Compl. at 5.). Himmelreich claims he is reputed to be "one of the biggest pedophiles on the Elkton compound." (Compl. at 5.) He further contends that Macari's Pre-Sentence Report shows he has a history of committing violent crimes. Himmelreich claims Newland, the case

manager, should have known that Himmelreich would be in danger if Macari was released from segregation.

Macari was moved to the general population on October 20, 2008. Later that day, October 20, 2008, Himmelreich was attacked by Oberkramer and Macari. Himmelreich was returning from his work detail and had just climbed the stairs to Unit B, when he was approached by the other two inmates. He contends Officer Simmons was standing outside, approximately ten feet from the sally port door of Unit B, smoking a cigarette. Another officer was stationed at the door to Unit A, but was not at his post. Himmelreich claims Macari began to hit and kick him while Oberkramer held the door closed so he could not escape. Other inmates returning to the unit began to yell, "fight!" in the stairwell, but neither Officer Simmons nor the officer from Unit A responded. Himmelreich states that the attack lasted for approximately a minute, until the "move is closed" announcement was made. (Compl. at 5C.) At that point, the inmates retreated into the unit. Himmelreich initially went to his cell to assess the damage and then he returned to the scene of the attack to wait for Officer Simmons.

Himmelreich was taken to the Lieutenant's Office and questioned about the incident. He was asked to identify his attackers, and was able to point out Oberkramer. Macari voluntarily surrendered to the Lieutenant's office. All three inmates were taken separately to the medical department to be treated for their injuries and then escorted to segregation.

At 9:30 p.m., Himmelreich complained he was having difficulty inhaling. He was taken to the medical department. Nurse Folkwein was on duty and examined him. She concluded he required a higher level of care than she could provide but was unable to reach the on-call physician. The administrator she contacted would not authorize a trip to an outside facility and ordered a combination of Tylenol and Motrin. Himmlreich was then returned to segregation for the night. On October 22, 2008, he received x-rays of his chest and head. He does not provide the results of these x-rays. He claims he began to suffer from Tinnitus after the assault. He reported to sick call. He contends he was not charged a co-pay for this visit because it was related to the attack; however he was charged the co-pay for subsequent visits. He filed grievances but his funds were not returned. He claims he visited the Psychology Department at FCI Elkton in November 2008. He states he was told by Dr. Lefever that he was safe at Elkton. He claims the Defendants were deliberately indifferent to his safety and to his serious medical needs.

Himmelreich attempted to pursue other remedies against the inmates and the United States. He asked Lieutenant Butts to file charges against the inmates with the FBI. He later learned the FBI would not initiate a criminal investigation. He filed an action under the Federal Tort Claims Act, in February 2009, claiming that prison officials failed to protect him from Macari's attack. That action, *Himmelreich v. United States*, No.

4:10CV307 (N.D. Ohio Nov. 18, 2010) (Adams, J.) was dismissed on the merits. He claims that shortly after he filed the action in federal court, he was placed in segregation without receiving an explanation. He claims Captain Fitzgerald told him that he was in segregation for filing the tort claim. He claims he was denied Due Process and was subjected to cruel and unusual punishment.

Analysis

Although *pro se* pleadings are liberally construed, *Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (per curiam); *Haines v. Kerner*, 404 U.S. 519, 520 (1972), the district court is required to dismiss an *in forma pauperis* action under 28 U.S.C. § 1915(e) if it fails to state a claim upon which relief can be granted, or if it lacks an arguable basis in law or fact.[2] *Neitzke v. Williams*, 490 U.S. 319 (1989); *Lawler v. Marshall*, 898 F.2d 1196 (6th Cir. 1990); *Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir. 1996). For the reasons stated below, this action is dismissed pursuant to section 1915(e).

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[2] An *in forma pauperis* claim may be dismissed *sua sponte*, without prior notice to the plaintiff and without service of process on the defendant, if the court explicitly states that it is invoking section 1915(e) [formerly 28 U.S.C. § 1915(d)] and is dismissing the claim for one of the reasons set forth in the statute. *McGore v. Wrigglesworth*, 114 F.3d 601, 608-09 (6th Cir. 1997); *Spruytte v. Walters*, 753 F.2d 498, 500 (6th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986); *Harris v. Johnson*, 784 F.2d 222, 224 (6th Cir. 1986); *Brooks v. Seiter*, 779 F.2d 1177, 1179 (6th Cir. 1985).

I. Defendants

As an initial matter, Himmelreich names several Defendants who are not subject to suit in a *Bivens* action. *Bivens* provides a cause of action against individual officers acting under color of federal law alleged to have acted unconstitutionally. *Correctional Services Corporation v. Malesko*, 534 U.S. 61, 70 (2001). A *Bivens* action therefore cannot be brought against a federal prison, the Bureau of Prisons, or the United States Government. *Id.* Himmelreich's claims against the BOP, and FCI Elkton, therefore, must be dismissed.

Moreover, claims against a federal officer in his official capacity impose liability on the office he represents. *Brandon v. Holt*, 469 U.S. 464, 471 (1985). Warden J.T. Shartle and Attorney General Eric Holder are federal officers employed representing the United States Government. Claims against them in their official capacities must also be dismissed.

Finally, *Bivens* claims may only be brought against individuals acting under color of federal law. Generally to be considered to have acted under color of federal law, the person must be a United States government official or employee. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Macari and Oberkramer are inmates in a federal correctional institution, not government officials. They are not subject to suit in a *Bivens* action.

II. Respondeat Superior

To the extent Himmelreich was bringing claims against Eric Holder and J.T. Shartle in their individual capacities, he has not stated a claim cognizable under *Bivens*. He states these individuals are liable to him for damages under the doctrine of *respondeat superior*. *Respondeat superior* is not a proper basis for liability in a *Bivens* action. *See Nwaebo v. Hawk-Sawyer*, No. 03-3801, 2003 WL 22905316, at *1 (6th Cir. Nov. 28, 2003) (citing *Rizzo v. Goode*, 423 U.S. 362, 373-77(1976)); *Hall v. United States*, 704 F.2d 246, 251 (6th Cir. 1983); *Kesterson v. Fed. Bureau of Prisons*, No. 02-5630, 2003 WL 1795886 (6th Cir. April 2, 2003); *see also Steele v. Fed. Bureau of Prisons*, 355 F.3d 1204, 1214 (10th Cir. 2003) (to be subject to *Bivens* liability, a defendant must have had "direct, personal participation" in the constitutional violation). The liability of supervisors cannot be based solely on the right to control employees, nor simple awareness of employees' misconduct. *See Leary v. Daeschner*, 349 F.3d 888, 903 (6th Cir. 2003); *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir. 1984). Furthermore, "a supervisory official's failure to supervise, control or train the offending individual is not actionable unless the supervisor 'either encouraged the specific incident of misconduct or in some other way directly participated in it.'" *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999). At a minimum, a plaintiff must show that the supervisor implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.

Id. There are no allegations in the Complaint that reasonably suggest either Warden Shartle or United States Attorney General Eric Holder were personally involved in the assault, or implicitly authorized or approved of the actions of prison personnel in relation to the assault. Accordingly, the claims against them must be dismissed.

III. Eighth Amendment

Himmelreich claims the Defendants failed to adequately protect him from an inmate assault and did not provide him with proper medical care for his injuries. Prison officials may not deprive inmates of "the minimal civilized measure of life's necessities." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). The Supreme Court in *Wilson v. Seiter*, 501 U.S. 294, 298 (1991), set forth a framework for courts to use when deciding whether certain conditions of confinement constitute cruel and unusual punishment prohibited by the Eighth Amendment. A plaintiff must first plead facts which, if true, establish that a sufficiently serious deprivation has occurred. *Id.* Seriousness is measured in response to "contemporary standards of decency." *Hudson v. McMillian*, 503 U.S. 1, 8 (1992). Routine discomforts of prison life do not suffice. *Id.* Only deliberate indifference to serious medical needs or extreme deprivations regarding the conditions of confinement will implicate the protections of the Eighth Amendment. *Id.* at 9. A plaintiff must also establish a subjective element showing the prison officials acted with a sufficiently culpable state of mind. *Id.* Deliberate indifference is characterized by obduracy or wantonness,

not inadvertence or good faith error. *Whitley v. Albers*, 475 U.S. 312, 319 (1986). Liability cannot be predicated solely on negligence. *Id.* A prison official violates the Eighth Amendment only when both the objective and subjective requirements are met. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

As a threshold matter, Himmelreich fails to establish the objective component of his claims against Captain Fitzgerald and Lieutenant Butts. He alleges he filed a grievance after his attack concerning the state of security at FCI Elkton. He alleges Captain Fitzgerald's response to his criticism was defensive and unhelpful. He claims Lieutenant Butts told him he would file a report with the FBI, but the FBI would not proceed with an investigation. Responding to a grievance or otherwise participating in the grievance procedure is insufficient to trigger liability under 42 U.S.C. § 1983. *Shehee v. Luttrell*, 199 F.3d. 295, 300 (6th Cir. 1999). Even if Captain Fitzgerald's response sounded defensive or unsympathetic, it would not state a claim under the Eight Amendment. Verbal harassment and offensive comments are generally not cognizable as constitutional deprivations. *See Ivey v. Wilson*, 832 F.2d 950, 955 (6th Cir. 1987). In addition, Himmelreich does not indicate how Lieutenant Butts's failure to report the incident to the FBI violated civilized standards of humanity and decency. *Rhodes v. Chapman*, 452 U.S. 337, 345 (1981). These allegations do not rise to the level of a Constitutional violation.

Similarly, Himmelreich does not allege facts to suggest Bunts, Dr. Lefever, or Nurse Folkwein were deliberately indifferent to his serious medical needs. There are no allegations against Bunts. Himmelreich claims he was treated by Nurse Folkwein after the assault. She was unable to contact the physician on call and was denied permission from an administrator to take him to an outside medical provider. He was given Tylenol and Motrin for the pain. He does not indicate the nature of his injuries. He states he was given chest and head x-rays. He does not provide the results of those tests. He contends he saw Dr. Lefever in the Psychology Department approximately a month after the assault. He alleges he was told he was safe. There is no indication in any of these allegations that Himmelreich was denied treatment for a serious medical condition.

In addition, Himmelreich has not established the Defendants acted with a sufficiently culpable mental state to justify a finding of liability under the Eighth Amendment. An official acts with deliberate indifference when "he acts with criminal recklessness," a state of mind that requires that the official act with conscious disregard of a substantial risk of serious harm. *Id.* at 837. Mere negligence will not suffice. *Id.* at 835-36. Himmelreich alleges Newland should have been familiar with the files of the inmates in her unit and should have been aware of the threats Macari made in segregation against pedophiles. He further claims she should have known he would be a target if Macari was released to the general population.

He also contends that Corrections Officer Simmons was smoking and not at his post when the assault occurred. These allegations describe conduct which is negligent at best. There are no facts in the Complaint which reasonably suggest these individuals acted with a sufficiently culpable state of mind to trigger Eighth Amendment protections.

IV. Disciplinary Segregation

Finally, Himmelreich contends he was denied due process when he was placed in segregation without explanation in 2009. The Fourteenth Amendment provides a state may not "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. In addition to setting the procedural minimum for deprivations of life, liberty, or property, the Due Process Clause bars "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). It does not prohibit every deprivation by the state of a person's life, liberty or property. *Harris v. City of Akron*, 20 F.3d 1396, 1401 (6th Cir. 1994). Only those deprivations of constitutionally protected interests which are conducted without due process are subject to suit under 42 U.S.C. § 1983. *Id.*

Prisoners have narrower liberty interests than other citizens as "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations un-

derlying our penal system." *Sandin v. Conner*, 515 U.S. 472, 485 (1995). The question of what process is due is answered only if the inmate establishes a deprivation of a constitutionally protected liberty interest. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). The Due Process Clause, standing alone, confers no liberty interest in freedom from state action taken within the sentence imposed. *Sandin*, 515 U.S. at 480. "Discipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law." *Id.* at 485. "[T]he Constitution itself does not give rise to a liberty interest in avoiding transfer to more adverse conditions of confinement." *Wilkinson*, 545 U.S. at 221.

Generally, unless placement in disciplinary confinement is accompanied by a withdrawal of good time credits or is for a significant period of time that presents an unusual hardship on the inmate, no interest to remain free of disciplinary confinement will be found in the case. *Sandin*, 515 U.S. at 484. Assignment to a super-maximum security prison, for example, triggers due process protections, *Wilkinson*, 545 U.S. at 224, while temporary placement in disciplinary confinement was considered to be "within the range of confinement normally expected for one serving an indeterminate term of 30 years to life," *Sandin*, 515 U.S. at 487. Similarly, the Sixth Circuit Court of Appeals has held a prisoner's designation as a member of a security threat group did not give rise to a liberty interest. *Harbin-Bey v. Rutter*, 420 F.3d 571, 577

(6th Cir. 2005). There is no indication Himmelreich was sanctioned with the loss of good time credits. Absent other allegations, Himmelreich's placement in segregation for a period of 60 days does not impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484.

Himmelreich also contends his placement in segregation was a violation of the Eighth Amendment. There was nothing in the Complaint to indicate that the conditions to which he was subjected in the segregation unit constituted cruel and unusual punishment.

Conclusion

Accordingly, this action is dismissed pursuant to 28 U.S.C. § 1915(e). The court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith.[3]

IT IS SO ORDERED.

Date: Mar. 9, 2011

/s/ JOHN R. ADAMS
JOHN R. ADAMS
UNITED STATES DISTRICT JUDGE

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[3] 28 U.S.C. § 1915(a)(3) provides:

An appeal may not be taken *in forma pauperis* if the trial court certifies that it is not taken in good faith.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4:10CV307

WALTER J. HIMMELREICH, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: Nov. 18, 2010

MEMORANDUM OF OPINION AND ORDER

Judge JOHN R. ADAMS

Pending before the Court is the Government's motion to dismiss (Doc. 31) Plaintiff Walter J. Himmelreich's complaint. Himmelreich has opposed the motion. Following review of the pleadings and relevant law, the motion to dismiss is GRANTED. The complaint is hereby DISMISSED.

I. Facts

Himmelreich filed his complaint as an appeal from the denial of an administrative tort claim. Accordingly, he

seeks relief under the Federal Tort Claims Act ("FTCA"). While the complaint itself contains no factual allegations, Himmelreich's supporting documents make his claim clear. Himmelreich contends that the Government failed to protect him from an assault perpetrated by another inmate. Specifically, Himmelreich contends that prison officials had notice of the assailant inmate's intent to harm and did nothing to protect against it. In fact, Himmelreich's administrative claim for damages begins "I was intentionally assaulted by inmate Peter Macari after he told staff member(s) that it was his intention." Doc. 1-1 at 3.

On October 13, 2010, the Government moved to dismiss the complaint. In its motion, the Government contends that the discretionary function exception to the FTCA supports dismissal. On November 10, 2010, Himmelreich opposed the motion. The Court now resolves the matter.

II. Legal Standard and Analysis

There is no dispute that Himmelreich's claim falls under the FTCA. Accordingly, the sole issue before the Court is whether the discretionary function exception applies to the facts alleged by Himmelreich.

Under the FTCA, the United States has consented, subject to certain exceptions, to suit for damages for personal injuries caused by the negligence of government employees acting within the course and scope of their employment. *See* 28 U.S.C. §§ 1346(b), 2671-2680. The

FTCA's waiver of sovereign immunity is limited by the discretionary function exception. 28 U.S.C. § 2680(a) provides that the United States has not consented to suit where the claim is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." As the United States has not waived its sovereign immunity with respect to discretionary functions, this Court lacks subject matter jurisdiction over acts falling within the discretionary function exception. *Rosebush v. United States*, 119 F.3d 438, 440 (6th Cir. 1997).

This Court must utilize a two-part test to determine whether a governmental act falls within the exception. First, the Court must determine whether the act involves "an element of judgment or choice." *United States v. Gaubert*, 499 U.S. 315, 322, (1991) (quotation marks omitted). If the Court answers that question in the affirmative, then it must ask "whether that judgment is of the kind that the discretionary function exception was designed to shield." *Id.* at 322-23 (quotation marks omitted).

With respect to the first question before the Court, the Sixth Circuit has previously determined that the provisions at issue herein regarding inmate safety involve judgment. *See Montez ex rel. Estate of Hearlson v. United States*, 359 F.3d 392 (6th Cir. 2004). In *Montez*, the Circuit explicitly rejected the argument put forth by

Himmelreich that 18 U.S.C. § 4042(a) creates a mandatory duty of care upon the Bureau of Prisons thereby eliminating any discretion. "[T]he duty imposed by § 4042(a) is of a general nature, broadly requiring that the BOP 'provide for the safekeeping' and 'provide for the protection' of federal inmates. BOP officials are given no guidance, and thus have discretion, in deciding how to accomplish these objectives." *Montez*, 359 F.3d at 396. Accordingly, the Court answers the first prong of its inquiry in the affirmative.

Next, the Court must determine whether the prison officials' decision "is of the kind that the discretionary function exception was designed to shield." *Gaubert*, 499 U.S. at 322-23. While this presents a closer question under the facts alleged, *Montez* compels a conclusion that the exception applies herein.

While Himmelreich has never described the precise nature of the alleged threat made by the assailant inmate, the record makes clear that the inmate threatened to "smash a pedophile" if he was returned to general population. Doc. 31-2 at 3. This indicates a general threat to a substantial portion of the population of the prison. Himmelreich has never alleged that a direct threat to him was made and indeed seems to acknowledge the accuracy of the description of the type of threat as detailed by the Government. Accordingly, the Court must decide whether the prison officials' decision to release the inmate back into general population despite this threat subjects them to liability.

Since the policy at issue provides for discretion, Himmelreich must do the following to survive a motion to dismiss:

> When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.

Gaubert, 499 U.S. at 324-25.

With respect to the facts as alleged by Himmelreich, *Montez* is particularly instructive:

> As a general principle, a complaint that alleges the existence of a specific and immediate threat against an inmate is more likely to survive a motion to dismiss than a complaint that either alleges a nonspecific threat or provides only conclusory statements regarding the existence of a threat. This follows from the fact that decisions by prison officials to ignore specific and immediate threats against in-

> mates are less likely to be the type of decision that can be said to be grounded in the underlying policy of the BOP, which requires prison officials to provide for the safekeeping and protection of inmates. See 18 U.S.C. § 4042(a). In light of this general principle, we regard *Dykstra* as a close case because the prison officials apparently knew that Dykstra was at a higher risk of sexual assault and that the inmate who eventually attacked Dykstra had been staring at him.

Montez, 359 F.3d at 398. Similar to the plaintiff in *Montez*, Himmelreich's complaint and accompanying argument offer "nothing more than a bare assertion that the discretionary function exception does not apply[.]" *Id.*

Himmelreich has not alleged any specific threat and provided only conclusory statements regarding a general threat that was made by another inmate. Accordingly, Himmelreich "has failed [] to allege any facts establishing that [the prison official's] decision was not grounded in policy considerations." *Dykstra v. United States Bureau of Prison*, 140 F.3d 791, 796 (8th Cir. 1998) (cited approvingly in *Montez*, supra). Additionally, the Court notes that it is Himmelreich, not the United States, that must assert these facts. *Id.* Himmelreich

> has not done so, and probably could not succeed in doing so in any event. Prison officials supervise inmates based upon security levels, available resources, classification of inmates, and other factors. These factors upon which prison officials base such

> decisions are inherently grounded in social, political, and economic policy. We have no difficulty in concluding that the discretionary function exception applies to the correctional officer's decision not to place [the prisoner] in protective custody or to take other protective action.

Id. The above-conclusion is even stronger herein. Elkton Prison Unit Manager Jason Streeval filed an affidavit in support of the Government's motion to dismiss. Streeval's affidavit makes clear that the prison official's determination was grounded in a policy decision. Streeval explained that inmates often posture by threatening to harm pedophiles and rarely carry out such threats. Accordingly, prison "[s]taff weighed what he said but without a more specific threat against a particular inmate" determined that a return to general population was appropriate.

Based upon the above precedents, it is clear that the decisions challenged by Himmelreich fall within the discretionary function exception. Accordingly, the Government's motion to dismiss is GRANTED.

III. Conclusion

Plaintiff Walter Himmelreich's complaint is hereby DISMISSED. Further, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith.

IT IS SO ORDERED.

Date: Nov. 18, 2010 /s/ JOHN R. ADAMS
Judge JOHN R. ADAMS
UNITED STATES
DISTRICT COURT

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4:10CV307

WALTER J. HIMMELREICH, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Nov. 18, 2010

JUDGMENT ENTRY

Judge JOHN R. ADAMS

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Government's motion to dismiss is GRANTED. The complaint is hereby DISMISSED. Pursuant to 28 U.S.C § 1915(a)(3), the Court certifies that Plaintiff may not take an appeal from the Court's decision in good faith.

IT IS SO ORDERED.

Nov. 18, 2010
Date

/s/ JOHN R. ADAMS
Judge JOHN R. ADAMS
United States District Court

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 4:10cv307

WALTER J. HIMMELREICH, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Mar. 6, 2012

ORDER

Appellant/Petitioner having previously been advised that failure to satisfy certain specified obligations would result in dismissal of the case for want of prosecution and it appearing that the appellant/petitioner has failed to satisfy the following obligation(s):

The proper fee was not paid by March 5, 2012.

It is therefore **ORDERED** that this cause be, and it hereby is, dismissed for want of prosecution.

ENTERED PURSUANT TO RULE 45(a), RULES OF THE SIXTH CIRCUIT
Leonard Green, Clerk

/s/ [ILLEGIBLE]

Issued: Mar. 06, 2012

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 4:10CV307

WALTER J. HIMMELREICH, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Aug. 30, 2012

ORDER

Judge JOHN ADAMS

Pending before the Court is Plaintiff Walter Himmelreich's motion "to recall judgment." The motion is DENIED.

This Court dismissed Himmelreich's complaint on November 18, 2010. Specifically, the Court found that the discretionary function exception applied to bar Himmelreich's claim against the Government. In his latest motion, Himmelreich contends that a partial reversal in another case he filed merits vacating the decision in this matter. This argument has no merit.

In addition to his complaint against the Government, Himmelreich also raised *Bivens* claims and Eighth Amendment claims against numerous prison officials. This Court dismissed the complaint. On appeal, the Sixth Circuit found that Himmelreich has properly alleged Eighth Amendment claims against certain prison officials. Contrary to Himmelreich's contentions, the Sixth Circuit made no findings that the officials were negligent or deliberately indifferent. Rather, the Circuit found that Himmelreich had made sufficient allegations to survive dismissal at the initial stage of the case.

The Sixth Circuit decision does not constitute new evidence that would support vacating this Court's prior decision. Moreover, nothing contained in that decision provides any reason for the Court to revisit its prior legal analysis.

The remainder of Himmelreich's motion re-argues the merits of his case. The Court rejected those arguments previously. Himmelreich's appeal from that dismissal was dismissed for lack of prosecution. He may not now use a motion to vacate as a substitute for his appeal. His arguments, therefore, are rejected.

The motion to recall judgment and/or vacate the Court's prior decision is DENIED. The court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith.[1]

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[1] 28 U.S.C. § 1915(a)(3) provides:

IT IS SO ORDERED.

Aug. 30, 2012 /s/ JUDGE JOHN R. ADAMS
JUDGE JOHN R. ADAMS
UNITED STATES
DISTRICT COURT

An appeal may not be taken *in forma pauperis* if the trial court certifies that it is not taken in good faith.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 12-4142

WALTER J. HIMMELREICH, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Filed: May 29, 2013

ORDER

On Appeal from the United States District Court for the Northern District of Ohio

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Before: MARTIN, GILMAN, and KETHLEDGE, Circuit Judges.

Walter J. Himmelreich, a pro se federal prisoner, appeals a district court order denying his motion for relief from judgment in a case he filed pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 et seq. He also moves to stay this appeal pending the disposition of a case before the Supreme Court. This case has been re-

ferred to a panel of the court pursuant to Federal Rule of Appellate Procedure 34(a)(2)(C). Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Himmelreich originally filed this action under the FTCA, complaining that he had been assaulted by a fellow prisoner who was allowed in the general population despite his threats that he would assault pedophiles. The district court held that it lacked jurisdiction over the claim because it was barred by the discretionary function exception in 28 U.S.C. § 2680(a). This Court denied Himmelreich in forma pauperis status on appeal and subsequently dismissed the appeal for failure to prosecute.

Meanwhile, Himmelreich was also pursuing a *Bivens* action that arose out of the same incident against numerous defendants, which was dismissed by the district court for failure to state a claim. This Court affirmed that order in part and vacated and remanded it in part, holding that claims of First Amendment retaliation and Eighth Amendment failure to protect were stated against some of the defendants. Himmelreich then filed a motion for relief from judgment in his FTCA action, asserting that a footnote in this court's order in the *Bivens* action, stating that one defendant was at most negligent and therefore no claim was stated against her for failure to protect under the Eighth Amendment, somehow rendered the district court's dismissal of his FTCA complaint under the discretionary function exception invalid. The district court disagreed and denied the motion. Him-

melreich reasserts his argument for relief from judgment on appeal.

The denial of a motion for relief from judgment is reviewed for an abuse of discretion, which will be found only where the district court has committed a clear error. *Coyer v. HSBC Mortg. Servs., Inc.*, 701 F.3d 1104, 1110 (6th Cir. 2012). The district court originally dismissed Himmelreich's complaint for lack of jurisdiction because the acts complained of fell within the discretionary function exception. *See Rosebush v. United States*, 119 F.3d 438, 440 (6th Cir. 1997). The district court did not abuse its discretion in concluding that this Court's order in Himmelreich's appeal in his *Bivens* action provided no basis for relief from the dismissal.

Himmelreich's motion to stay this appeal pending the disposition of a case before the Supreme Court is moot because the case in question has been decided, and it has no bearing on this appeal. *Millbrook v. United States*, 133 S. Ct. 1441 (2013), dealt with a different exception to the FTCA, the intentional-tort exception in 28 U.S.C. § 2680(h), applying to an assault by a federal employee.

Accordingly, the motion to stay is denied and the district court's order denying the motion for relief from judgment is affirmed. Fed. R. App. P 34(a)(2)(C).

ENTERED BY ORDER OF THE COURT

/s/ [ILLEGIBLE]
Clerk

APPENDIX K

1. 28 U.S.C. 1346(b) provides:

United States as defendant

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

2. 28 U.S.C. 2676 provides:

Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

3. 28 U.S.C. 2679 provides:

Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money dam-

ages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therin to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee

was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all reference thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provision of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title,

such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

4. 28 U.S.C. 2680 provides:

Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any Claim based upon an action or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.[1]

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[1] So in original

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, ch. 1049, § 13 (5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(*l*) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.